Evolving An Effective Legal Protection for Women's Inheritance Rights in Ghana: A Need for Legal Reforms and Implementation

Angela Yeboah-Appiah

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Faculty of Law, Common Law
University of Ottawa

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Abstract

This thesis analyzes the inequality women face in the inheritance regime in Ghana. The existing legal framework which includes customary law is fraught with challenges that hinder women from claiming a fair share of their inheritance rights. Existing customary laws conflict with statutory law. Customary law contains aspects that contradict principles of equality espoused in statutory law. Additionally, the court relies on "judicial customary law" which contains old inheritance practices that do not reflect socio-economic changes. Finally, the judiciary in Ghana also uses the repugnancy doctrine in the interpretation and application of customary law. However, the repugnancy doctrine is outdated and constitutes a major hindrance for women in claiming a fair share of their inheritance rights.

Drawing on postcolonial theory, intersectional feminism, law and society and sociology of law theories, this dissertation investigates and addresses the injustices associated with women's rights of inheritance in Ghana. A major goal is to provide viable pathways that will ensure an equitable framework in the sharing of intestate property.

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Lists of Abbreviations

ACLP	Ascertainment and Codification of Customary Law Project
ACHPRs	African Charter on Human and People's Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
DFAIT	Canada's Department of Foreign Affairs and International Trade
FIDA	International Federation of Women Lawyers
GHIAWJ	International Association of Women Judges, Ghana
ILDC	International Law in Domestic Courts
JPC	Justice and Peace Commission
JEP	Jurisprudence of Equality
KWJA	Kenya Women Judges Association
LAP	Leal Awareness Programme
NCCE	National Commission on Civic Education
WILDAF	Women in Law and Development Ghana

Chapter 1: Introduction

Women's inheritance and property rights are major social issues in Africa.[1] In 2015, research showed that there were 258,481,056 widows around the world, of whom widows in Ghana constituted 766,260.[2] The Loomba Foundation estimated that 15% of widows worldwide were living in extreme poverty, and 33% were deprived of their inheritance rights and unfairly treated, with no access to land or a home.[3] Women contribute directly and indirectly to the acquisition of property.[4] However, women often do not get a fair share of their inheritance rights, and widows are left homeless and impoverished.[5] The denial of their inheritance rights also results in loss of dignity, as it ignores women's economic agency and capacity to make informed decisions regarding their contributions to matrimonial property.[6]

Several laws have been enacted to secure the property rights of women in Ghana, including provisions in the Constitution, Administration of Estates Act, Wills Act and PNDC law 111. The Administration of Estates Act is the law that governs the administration of the personal estates of deceased persons.[7] The Act places limitations on the disposal of such properties and makes provision for the registration of documents and the handling of claims. The Wills Act permits any

[1] Rose Korang- Okrah, *Risk and Resilience: Ghanaian (Akan) Widows and Property Rights* (PhD Dissertation, University of Illinois,2012) 3.
[2] The Loomba Foundation, *World Widow's Report: A Critical Issue for the Sustainable Development Goals* (London: Standard Information,2016).
[3] *Ibid* at 132.
[4] Elizabeth A Acheampong, "Matrimonial Property Division at Marriage Breakdown: The Way Forward" (2007) 4 KNUST LJ 78 at 98.
[5] Jean- Marie Fenrich & Tracy Higgins, "Promise Unfulfilled: Law, Culture and Women's Inheritance Rights in Ghana" (2001) 25:2 Fordham Intl LJ 259 at 261.
[6] Anthony C Diala, "The Shadow of Legal Pluralism in Matrimonial Property Division Outside the Courts in Southern Nigeria" (2018) 18:2 AHRLJ 706 at 708.
[7] Administration of Estates Act 1961 (Cap.63).

person of or above the age of eighteen to make a will disposing of property.[8] The Intestate Succession Act (PNDC Law 111) aims at the devolution of the estates of deceased persons who died without a will. Despite the existence of these laws, women are still disadvantaged when claiming their inheritance rights.[9]

Both statutory and customary law play a functional role in the Ghanaian justice system.[10] However, customary law plays a predominant role in succession and inheritance.[11] It governs both ownership of property acquired during the marriage and the composition of the inheriting group, including what share of the deceased's properties the surviving spouse receives.[12] Therefore, it can be argued that in Ghana, there is an intricate link between customary law and women's inheritance rights.[13] Almost invariably, women occupy a disadvantaged position under customary law. Parts of Africa that are mainly traditional societies are governed based on patriarchal structures where women's individual interests are subsumed under the interests of the group. Therefore, customary law contains aspects that often contradict the principles of gender equality and non-discrimination espoused in statutory laws.

[8] Wills Act 1971, s 1.

[9] Victor Gedzi, "PNDC Law 111 in Ghana and International Human Rights Law" (2014) 2:2 Global Journal of Politics and Law Research 15 at 16. Laws including the PNDC Law 111, Wills Act and the Administration of Estate Act have not made substantial impact in promoting equality in the inheritance system in Ghana. PNDC Law 111 only focuses on self-acquired properties instead of inherited property. The Administration of Estates Act allows the court to grant letters of administration to beneficiaries to administer the estates of the deceased. The processes involved in obtaining letters of administration are complex and cumbersome and must be reduced to clear and simple terms for women to patronize.

[10] Fenrich & Higgins, *supra* note 5 at 269.

[11] *Ibid* at 269.

[12] *Ibid* at 269.

[13] Patricia G Kameri-Mbote, "Gender Dimensions of Law, Colonialism and Inheritance in East Africa: Kenya Women's Experiences" (2002) 35:3 Law & Politics in Africa, Asia, & Latin America 373 at 397.

Before the British came to Ghana, its traditional communities were regulated exclusively by customary law.[14] The customary laws in Ghana were diverse, as they varied from tribe to tribe and were enforced and adhered to by both kings and their subjects.[15] However, on 24 July 1874, the Gold Coast (Ghana) was declared a British colony, with its own legislature and executive.[16] The colonial legislature soon promulgated the Supreme Court Ordinance of 1876 in an attempt to introduce English common law to Ghana. The impact of the Ordinance was the introduction of a dual legal framework in the country that is made up of English common law and Ghanaian customary laws.[17] Section 19 of the Ordinance established the right of a Ghanaian citizen to be regulated by their customary law by guaranteeing the power of the Supreme Court to adhere to and enforce the observance of any law or custom in the colony.[18] The Supreme Court Ordinance created a choice of law in that judges had to decide which system of law to apply: English law on the one hand or the Ghanaian customary laws on the other hand.

The legal recognition of customary law "brought with it the question of ascertainment of its content."[19] The Supreme Court Ordinance sets up complex rules for the terms and conditions according to which customary law should be observed and implemented by the court. Customary laws could only be applied and enforced by the courts "if they were not repugnant to natural justice,

[14] Kofi Quashigah, "The Historical Development of the Legal System of Ghana: An Example of the Co-Existence of Two Systems of Law" (2008) 14:2 Fundamina Journal of Legal History 96.
[15] Archer Penk, "Codification of the Law: Ghana's Experience" (1987) 13:3 Comm Law Bull 1044-1050.
[16] Joseph B Akamba & Isidore Kwadwo Tufuor, "The Future of Customary Law in Ghana" in Jean Marie Fenrich et al, eds, *The Future of Living Customary Law* (Cambridge: Cambridge University Press, 2011) 204.
[17] Section 14 of the Ordinance provided that; "The Common Law, the doctrines of equity and the statutes of general application which were in force in England at the date when the colony obtained a local legislature, on the 24th day of July 1874 shall be in force within the jurisdiction of the Court.''
[18] Section 19 of the Supreme Court Ordinance,1876.
[19] Akamba & Tufuor, *supra* note 16 at 208.

equity, and good conscience."[20] In 1883, the colonial parliament promulgated the Native Jurisdiction Ordinance 5 of 1883, which made provision for the establishment of native courts that primarily adjudicated on matters of customary law and were presided over by the chiefs and their councillors. Appeals from the native courts had to be heard by the Supreme Court, while further appeals lay from the Supreme Court to the Privy Council.[21] In 1945, the Native Courts Ordinance was enacted, which extended the jurisdiction of the Native Courts to all land cases and criminal cases in the areas in which they had jurisdiction.[22] Therefore, there were two court systems in Ghana. The first system was the state courts, which heard cases involving common law or British law. The second system is made up of native courts, which adjudicated matters involving customary law alone.[23]

The plural legal system also led to "forum shopping," where parties chose which legal system to file a case.[24] For example, a woman married under both customary law and statutory law may choose to file a suit in intestate succession cases in the formal state court rather than in the informal traditional court. This is because the former may afford her more rights, such as a share in matrimonial property.[25] However, the woman's choice may be constrained by lack of access to the formal courts due to the high costs, geographical distance, the complexity of the procedure, and other factors. Such a woman may also be discouraged from filing suit in court by pressure from other family members.[26]

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[20] Section 19 of the Ordinance provided that: "Nothing in this Ordinance shall deprive the Courts of the right to observe and enforce the observance or shall deprive any person of the benefit of any native law or custom not being repugnant to natural justice, equity and good conscience."
[21] The Gold Coast Supreme Court Ordinance (No.4 of 1876), s 10.
[22] Native Courts Ordinance 5 of 1883, s 14(1)(2).
[23]Julia A Davies & Dominic N Dagbanja, "The Role and Future of Customary Tort Law in Ghana: A Cross-Cultural Perspective" (2009) 26:2 Ariz J Int'l & Comp L 305-306.
[24] Winifred Kamau, Customary Law, and Women's Rights in Kenya (2011) 7.
[25] *Ibid* at 7.
[26] *Ibid* at 7.

The conflict of laws persists in Ghana after independence. Perhaps the most captivating and vexing subject is the law of intestate succession. The Constitution of Ghana recognizes both the English common law and the existing customary laws.[27] Not only are there different forms of succession laws in Ghana, but these laws must coexist with the "received English law."[28] The problems of intestate succession for women in Ghana may be attributed to the application of English Law, as well as patrilineal and matrilineal laws of succession. Customary law of succession privileges the extended family, where the estate of the deceased devolves to the extended family to the detriment of the surviving wife.[29] The extended family is regarded as an important social unit, where Ghanaians trace their lineage and blood ties through either the matrilineal or the patrilineal line. As such, the estates of members revert to the lineage upon their death despite the contribution of women to the acquisition and maintenance of the property.[30]

On the other hand, the *English Law* proceeds on the basis that women are entitled to the exercise of their fundamental human rights and freedoms within the family and society and that the protection of the family as a social unit should not be used to justify restrictions on the individual rights of family members.[31] As such, the *English Law* acknowledges the contribution of women in the acquisition and maintenance of the property and the role these women play in supporting the economic activities of their husbands, which customary law fails to recognize.[32]

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[27] 1992 Constitution of the Republic of Ghana, art11.
[28] Ernest K Bankas, "Problems of Intestate Succession and the Conflict of Laws in Ghana" (1992) 26:2 Intl Lawyer 433 at 437.
[29]Fenrich & Higgins*, supra* note 5 at 270.
[30] *Ibid* at 270.
[31] Anne Hellum, "Women's Human Rights and African Customary Laws: Between Universalism and Relativism" (1998)10:2 Eur J Dev Res 88.
[32] *Ibid* at 89.

After administering the law of intestate succession for over a hundred years, Ghanaian courts still have great difficulty with how to resolve this conflict.[33] The main question to ask regarding problems of succession in Ghana is, "What law should govern the devolution of the estate of a person who has died intestate?" The challenge for the court in Ghana in making a choice as to what law to apply often arises from the fact that the intestate, in his lifetime married according to English law and was culturally rooted in patrilineal or matrilineal traditions.[34] The rights and obligations of parties under the various systems of inheritance are different. Therefore, when a legal dispute arises, it is usually challenging to determine which law to apply. For example, what law will be applied in the case of a man who practised matrilineal succession in his lifetime and married under the marriage ordinance? Is it the received English law or the matrilineal system of inheritance?

These parallel bodies of law relating to succession have created a conflict of laws problems which is a major hindrance to women receiving a fair share of their inheritance rights. There is uncertainty in the administration of laws, as judges are torn between conflicting laws.[35]

Choice of law rules in the Supreme Court Ordinance were used in the colonial period in British West African countries to enable the court to choose between customary law and English common law.[36] These rules remained in force after the attainment of independence and evidently still remain in operation in former British colonies such as Nigeria, Sierra Leone, and the Gambia with but

[33] Bankas, *supra* note 28 at 437.
[34] *Ibid* at 437.
[35] Oluwole I Agbede, "Legal Pluralism: The Symbiosis of Imported Customary and Religious Laws: Problems and Prospects" in Ayo M Ajomo, ed, *The Fundamentals of Nigeria Law* (Lagos: Nigeria Institute of Advanced Legal Studies, 1989) 235.
[36] Supreme Court Ordinance 4 of 1876; Kwamena Bentsi-Enchill, "Choice of Law in Ghana since 1960" (1971) 8 U. Ghana LJ 59.

minor changes.[37] Like other British dependencies, Ghana still uses this choice of law rules, with few changes made after independence.[38] However, the choice of law rules in the current Court Act 1993, does not purport to solve the conflict of laws in the Ghanaian legal system. This is because these rules have shortcomings and therefore pose challenges for the court. For example, regarding women's equal inheritance, Rule 2 of the choice of law rules, which specifically deals with the devolution of intestate property, requires the court to rely on "personal law," which is customary law for most Ghanaians.[39] This means that widows will be disadvantaged in the devolution of intestate property. Widows are disadvantaged in the devolution of intestate property because customary law favours the extended family at the detriment of the widows. The Act further permits the courts to hypothesize, connect and enforce the "relevant rules" of the conflicting systems of personal law to "achieve a result comfortable to natural justice, equity and good conscience."[40] This poses a big challenge for judges, specifically when relevant rules of the conflicting systems express or display incompatible results or outcomes, which, are by no means uncommon.[41] It is unfortunate that the courts still use the contentious concepts of natural justice, equity, and good conscience.

In the unlikely situation that none of the choice of law rules stipulated in the Act provides any guide as to which system of law should be applied, the court is directed to apply considerations of justice, equity, and good conscience in arriving at a decision.[42] This is what Allott has termed the judge's "basic sense of right and wrong."[43] Judges in Ghana continue to rely on their own

[37] *Ibid* at 60.
[38] *Ibid* at 60.
[39] 1993 Court Act of Ghana, (Act 459), rule 2.
[40] *Ibid* at 5&6.
[41] *Ibid* at 5&6.
[42] *Ibid* at rule 5&6.
[43] Anthony Allott, *New Essays in African Law* (London: Butterworth-Heinemann,1970) 348.

understanding of equity, their own standards and, techniques, and case laws in their administration of justice.[44] According to Asante, a legal scholar, "the Ghanaian judiciary has not done well in adapting the received English law into a Ghanaian common law."[45] For women to have a fair share of their inheritance, there is a need to balance the conflicting values between individual and group rights, to find common ground.[46] As such, Bentsi- Enchill, a legal scholar, has stated, "What we need in Ghana is not a set of rules for choosing between different systems of law but a framework of guiding principles for progressively developing one system of law generally applicable to everyone."[47]

Another principle of the English law that contributes to the injustices within the inheritance regime is the doctrine of judicial precedent. Customary law while not generally advantageous to women, is not static but flexible depending on the circumstances. When courts create precedents out of customary laws, they fossilize a dynamic system. Customary law had to be ascertained as a question of fact by the proof or evidence of witnesses. Decisions made by the court on customary law based on the evidence of witnesses became precedents. These precedents, known as "judicial customary law", are still referred to and applied by the Ghanaian court. Ghana is a developing state with notable socio-economic changes which render some of the customary rules of succession outmoded.[48] However, the court heavily relies on "judicial customary law", customary law as interpreted and applied by the court, which tends to be static and obsolete, thereby perpetuating

[44] *Ibid* at 163.
[45] Samuel KB Asante, "Over A Hundred Years of a National Law of Succession in Ghana: A Review and Critique" (1987) 31:1/2 J Afr L70.
[46] Ama Hammond, "Reforming the Law of Intestate Succession in a Legally Plural Ghana" (2019) 51:1 J Leg Pluralism & Unofficial L 117.
[47] Kwamena Bentsi-Enchill, "Choice of Law in Ghana Since 1960" (1971) 8 U. Ghana LJ 59.
[48] Quashigah, *supra* note 14 at 95-114.

the inequality women face in accessing their inheritance rights.[49] Judicial customary law has not reflected socio-economic changes and the current contribution women make towards the acquisition and maintenance of matrimonial property.[50] Judicial customary law still reflects old inheritance practices which are favourable to men, and were partly designed to ensure that a widowed woman was taken care of by the deceased husband's family. Due to capitalism, women's growing economic independence, and urbanization, the inheritance patterns no longer make sense, and the law must change. [51]

The court has not considered these socio-economic changes, as the court fails to recognize both the internal and external aspects of customary law in totality.[52] The external aspect is the aspect of customary law that can be easily observed, whilst the internal aspect of customary law refers to the foundational values of customary law. These foundational values that form the internal aspect of customary law describe the manners in which members of a social group regard their normative behaviour.[53] The internal aspect is flexible, as "it is dependent on contemporary social ideas of acceptable conduct.''[54] The social group critically examines their laws to determine when a law has outlived its usefulness or requires modification to suit socio-economic changes. However, the court concentrates on the external aspect and misses the internal aspect, which refers to the foundational values of customary law which are adapted to suit socio-economic changes, thereby denying women their inheritance rights.[55]

[49] *Ibid* at 110.
[50] *Ibid* at 112.
[51] Nelson Tebbe, "Inheritance and Disinheritance: African Customary Law and Constitutional Rights" (2008) 88:4 Journal of Religion 466-496.
[52] Anthony C Diala, "A Critique of the Judicial Attitude towards Matrimonial Property Rights under Customary Law in Nigeria's Southern States" (2018) 18:1 AHRLJ 103.
[53] *Ibid* at 103.
[54] *Ibid* at 103.
[55] *Ibid* at 103.

The last legal standard that distorts the Ghanaian legal system and has repercussions on women's inheritance rights is the repugnancy doctrine. The British colonial powers introduced the repugnancy doctrine into Ghana's legal system in the 19th century.[56] This doctrine states that the court shall not implement any customary law rule if it is repugnant to natural justice, equity, and good conscience. The repugnancy doctrine reflects English standards of fairness and equity.[57] The demands of the repugnancy doctrine were not easy to implement because of the absence of a defined method of application. After 64 years of independence, customary law in Ghana is still subjected to the repugnancy doctrine. Section 54 of the Court Act of 1993 empowers the court to apply customary laws to meet the requirement of "natural justice, equity and good conscience."[58] Due to the vagueness of the repugnancy doctrine, the court uses its discretion in the application of the test. This has effect on women's inheritance rights, as discriminatory customary laws of succession are applied based on the discretion of the court.[59]

Contributions to Scholarship

I argue that the current state of customary law in the regulation of inheritance rights does not guarantee equality for women. Considering the current status of customary law in the regulation of inheritance rights, my research seeks appropriate reforms to customary laws of inheritance in Ghana geared towards enhancing the property and inheritance rights of women in the country. I highlight reforms and viable pathways towards a pragmatic legal system that leverages the best of

[56] Uche U Ewelukwa, "Post-Colonialism, Gender, Customary Injustice: Widows in African Societies" (2002) 24 Hum Rts Q 424.
[57] *Ibid* at 426.
[58] 1993 Court Act of Ghana, s 54.
[59] Ewelukwa, *supra* note 56 at 424.

the complex legal system heritages in which Ghana has historically operated to sustainably tackle the injustices associated with women's inheritance rights. The reforms I propose include a unified law that will harmonize English common law and customary law, assessing customary law based on constitutional provisions of equality and non-discrimination. There are provisions in the 1992 Constitution of Ghana which seek to ensure that all Ghanaians enjoy equality and freedom from discrimination. These include Article 17(1), which states that "all have equal rights before the law."[60] Article 17(2) states that "a person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, creed or social or economic status."[61] Article 22(1), which specifically refers to the property rights of spouses, "provides both spouses with a reasonable portion of each other's estates, regardless of whether or not the spouse executed a will before death."[62] Assessing the customary law of succession based on these constitutional provisions will eliminate the discrimination women face in inheriting intestate property. I also interrogate the link between patriarchy and colonialism and its effects on women's inheritance rights in postcolonial Ghana. Additionally, I argue that judges must take into consideration the evolutionary nature of customary law and not resort to the strict application of stare decisis in the common law tradition. Hence the courts should apply customary law to reflect the lived experiences of the people it serves.[63] This requires the court to probe into the foundational values that underpin the diverse

[60] 1992 Constitution of Ghana, art 17(1).
[61] *Ibid* at 17 (2).
[62] *Ibid* at 22(1); see also article 26(2) which prohibits "all customary practices and dehumanises or are injurious to the physical and mental well-being of a person", Article 18(1) which gives an individual "the right to own property either alone or in association with others " and article 39(2) states that "states shall ensure that appropriate customary and cultural values are adapted and developed as an integral part of the growing needs of the society as a whole and in particular that traditional practices which are injurious to the health and well-being of the person are abolished.
[63] Hellum, *supra* note 29 at 88.

customary laws. Getting to the heart of the values of customary law is a difficult task but including those values in the interpretation of customary law is the best way to ensure fairness and equality.[64] Finally, I recommend that the maintenance system under customary law should be effectively regulated. An effective maintenance system will make customary successors more accountable for the welfare of the surviving spouse and children. Men should endeavour to make wills to safeguard the inheritance rights of the wives and children.

1.1 ORGANISATION OF CHAPTERS

The thesis is organized into six chapters. Chapter one introduces the research problem, my proposed methods for addressing the issue, and a brief outline of spousal property rights within the Ghanaian context.

Chapter two discusses the theoretical and analytical framework of this thesis. This chapter discusses intersectional feminist theory, postcolonial theory, law and society theory, and the sociology of law theory, which assist in highlighting the critical gaps and inadequacies in applying customary laws in Ghana. I combine these theoretical frameworks to address my research questions adequately. However, these theories have different foci and objectives. Therefore, for these theories to effectively interact, each theory complements the gaps in the other.

Chapter three investigates how the court can interpret and apply customary law to address women's inequality in claiming their inheritance rights, especially with Ghana's remarkable socio-economic changes. Chapter 3 addresses the wide gap between the "law in the books" and the "law

[64] *Ibid* at 90.

in action." It focuses on the challenges the judiciary faces in ascertaining living customary law. I probe further to find out the role of other key players like the chiefs and politicians in developing customary law to address the inequality women face in accessing their inheritance rights in Modern Ghana.[65] It is imperative that these critical stakeholders collaborate with the courts, as the task of developing customary law is too large to be left to the courts alone.[66]

Chapter 4 explores the contemporary relevance of the repugnancy doctrine and its impact on women's inheritance rights in postcolonial Ghana.[67] Finally I explore how the judiciary can modify the repugnancy doctrine.

Chapter five examines how to effectively reconcile the statutory law and customary laws of succession regulating women's inheritance and property rights in Ghana. Several schemes will have to be put into operation for the reconciliation process to occur, separately or preferably together.[68] This section identifies and examines these schemes, highlighting the gaps and their strengths and how they can apply to the Ghanaian context.

Chapter 6 is a case study on the restatement of customary law in four African countries; Kenya, Malawi, Botswana, and Swaziland (Eswatini). The chapter critically examines how the restatement of law approach has worked and evolved in these four African countries.

Chapter seven is a summary of the findings of the study, with recommendations on how to improve women's rights to intestate inheritance in Ghana.

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[65]Leigh T Toomey, "A Delicate Balance: Building Complementary Customary and State Legal Systems" (2010) 3:1 Law & Development Review 157 at 178.
[66]Muna Ndulo, "African Customary Law, Customs and Women's Rights" (2011) 18:1 Ind J Global Leg Stud 102.
[67]Toomey, *supra* note 65 at 178.
[68]Tsalim O Elias, *British Colonial Law: A Comparative Study of the Interaction between English Law and Local Laws in British Dependencies* (London: Stevens & Sons Ltd,1962) 287.

1.2 RESEARCH QUESTIONS AND THESIS STATEMENT

This thesis argues that women cannot effectively claim their inheritance rights unless the existing legal framework, including customary laws in Ghana, undergoes significant reforms. The three problematic areas identified in the Ghanaian inheritance regime are conflict of laws, the application of judicial precedents, and the use of the repugnancy doctrine. The existence of multiple laws leads to a choice of law dilemma which results in injustice within the inheritance regime. The use of the repugnancy doctrine by the courts results in unjust inheritance practices. Section 54 of the Court Act of 1993 empowers the court to assess customary laws to meet the requirement of "natural justice, equity and good conscience."[69] Due to the vagueness of the repugnancy doctrine, the court uses its discretion in the application of the doctrine. This has effect on women's inheritance rights, as discriminatory customary laws of succession are applied based on the discretion of the court.[70] Additionally, the courts apply judicial precedents which contain old inheritance practices which disfavour women due to socio-economic changes including the contribution of women towards the acquisition and maintenance of matrimonial property. I highlight these three main current loopholes within the customary law framework which hinder women from effectively claiming a fair share of their inheritance rights.

First, my research seeks to investigate how to resolve issues of conflict of laws to reconcile customary and statutory laws, as the plurality of laws and the interaction existing within the legal system constitute practical and legal challenges to women's inheritance rights in Ghana.[71] A

[69] 1993 Court Act of Ghana, s 54.
[70] Ewelukwa, *supra* note 56 at 424.
[71] Deborah Isser, "The Problem with Problematizing Legal Pluralism: Lessons from the Field" in Brian Tamanaha et al, eds, *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (London: Cambridge University Press, 2012) 237-248.

thorough analysis of both normative orders will highlight the common grounds for these laws to be reconciled. Furthermore, my research emphasizes the uniqueness of both normative orders, particularly their strengths and weaknesses. The harmonization of these two legal systems will benefit the Ghanaian judiciary faced with a choice of law dilemma in distributing intestate property.

Secondly, while recognizing the role of legislation in reform, I argue that the court has a role to play in ensuring that customary law is reformed and developed to address the inequality women face regarding inheritance rights. The courts need to overcome judicial passivity and hold a progressive view of customary law, especially customs and traditions that perpetuate the discrimination women face in claiming their inheritance rights.[72] My research seeks to investigate the role of the court, its approach, trends in interpreting and applying customary law to address this discrimination and whether the courts are responding to the need for change and showing an understanding of the existing social and economic conditions which are essential areas of intersectionality required to achieve effective reform.

Furthermore, my research will highlight the gap between judicial customary law, which is static, and the customary law being practised by the ordinary people (law in action), which is dynamic and adapts to changes, as it is dependent on contemporary social ideas of acceptable conduct. My research seeks to highlight the gap between judicial customary law and customary law practised by the people using the sociology of law theory and the law and society theory.

Finally, my research seeks to critically analyze the continued relevance and status of the doctrine of repugnancy as applied by the court in Ghana to resolve women's property and inheritance rights. I interrogate the efficacy and validity of the repugnancy doctrine using a postcolonial framework

[72]Ndulo, *supra* note 66 at 102.

to expose the interaction between pre-colonial and postcolonial structures and institutions within the legal system and its effects today. This analysis will highlight whether the courts should still maintain the clause in assessing the customary law of succession in Ghana and its repercussions on the inheritance rights of women.

1.3 OVERVIEW OF THE GHANAIAN LEGAL SYSTEM

This section provides a brief outline of the Ghanaian legal system and sources of law. Ghana is a sub-Saharan African country, the first country in that region to gain independence in 1957.[73] The country became a Republic in 1960.[74] It is bordered by Togo, Burkina Faso, Cote D'Ivoire, and the Atlantic Ocean. The Ghanaian legal system is based on English common law and customary law. According to the 1992 Constitution, the laws of Ghana are made up of the Constitution, Acts of Parliament, subsidiary legislation, and the common law of Ghana which includes the doctrines of equity and the rules of customary law including those determined by the superior courts.[75] The judiciary is composed of the Supreme Court, with at least ten justices nominated by the president and approved by Parliament. It is the highest court of appeal in the land. Others are the court of appeal, high court, and regional tribunals.[76] The judiciary also consists of lower state courts.[77] Presently, the lower state courts include the circuit courts, district courts, and juvenile courts. The Chief Justice can set up other lower courts based on discretion.

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[73] Akosua Anyidoho & ME Kropp Dakubu, "Ghana: Indigenous Languages, English and an Emerging National Identity" in Andrew Simpson, ed, *Language and National Identity in Africa* (New York: Oxford University Press Inc,2008) 141-157.
[74] Ama Hammond, *Towards an Inclusive Vision of Law: Reform and Legal Pluralism in Ghana* (PhD Dissertation, University of British Colombia, 2016) 6.
[75] 1992 Constitution of Ghana, art 11.
[76] *Ibid* at art 126 (1)(a).
[77] *Ibid* at art 126(1)(b).

This thesis mainly focuses on three types of law: state law, judicial customary law, and living customary law. State law in this thesis includes English common law, Acts of Parliament, and the Constitution. Judicial customary law is customary law as interpreted and applied by the court. Finally, living customary law is customary law developed and applied by specific communities in Ghana.

1.4 THE GHANAIAN CONTEXT OF SPOUSAL PROPERTY RIGHTS

Matters concerning spousal property rights in Ghana could arise in terms of property owned by a woman before marriage, during the subsistence of a marriage, during divorce, or upon the death of a spouse.[78] For the sake of this paper, I will concentrate on spousal rights upon the death of the spouse. There are specific sayings and metaphors used in Ghanaian society which illustrate women's position regarding the ownership, acquisition, and maintenance of property. For example, there are traditional proverbs such as "The palm tree does not bear fruit on a woman's farm."[79] This traditional saying shows that women are not supposed to own or acquire property like men, and even if they can, men are supposed to control their resources. Men are responsible for maintaining and providing economic support for their wives and children at home. This implies that a man's economic security is more significant than that of a woman. The social construct gives men more access to the control and use of property and relegates women to dependents.[80] This has become ingrained in the social conscience of the people to the extent that when a man lacks political, physical, and economic vitality, he is described as "a woman."

[78] Maame Efua Addadzi-Koom & Lydia A Nkansah, "Women at the Bench: Does it Make a Difference? Assessing the Impact of Women Judges in Addressing Gender-Based Issues in Ghana" (2019) 28 Onati Socio-Legal Series 1-22.
[79] Gedzi, "PNDC Law 111 in Ghana", *supra* note 9 at 733.
[80] *Ibid* at 733.

As such, the properties a man acquires are not the property of his wife. According to customary law, the woman is only regarded as just a helper to the man, the one who keeps the home and a reproductive channel.[81] Her efforts and obligation to reproduce are just seen as satisfying "her pre-existing marital obligations and [do] not give her an ownership stake."[82] Therefore, she is not offered a share of her husband's property after his death. The lineage of the deceased family is rather entitled to the estate of the deceased. The customary heir selected by the extended family not only inherits the property of the deceased, but also must maintain the deceased's dependants. If a customary heir fails to perform his obligations, the widow and children are impoverished.[83]

Traditionally, this arrangement of the customary heir maintaining the wife and children of the deceased was founded on families living in close-knit rural units.[84] However, today this arrangement negatively affects the woman's life including child-rearing, mobility, and ability to get a job. This is due to the influence of socio-economic changes such as urbanization, globalization, and women's independent income.

According to customary law, the wife is considered as a part of her husband's economic unit and access to her husband's property is limited or nonexistent.[85] Colonial and postcolonial government laws which did not provide equal rights for the socio-economic development of the sexes aggravated the status of women in traditional society.[86] According to Radcliffe-Brown, "for an understanding of any aspect of the social life of an African people, economic, political or religious,

[81] Gedzi, "PNDC Law 111 in Ghana", *supra* note 9 at 131; see also Fenrich & Higgins, *supra* note 5 at 271.
[82] *Ibid* at 131.
[83] *Ibid* at 131.
[84] Diala, "A Critique of Judicial Attitude", *supra* note 52 at 102.
[85] *Ibid* at 103.
[86] *Ibid* at 103.

it is essential to have a thorough knowledge of their system of kinship and marriage."[87] This partly explains why inequality is such an entrenched part of African indigenous systems.

This research provides an analysis of the inheritance rights of women, specifically under the Akan and Ewe systems. The Akan are the largest ethnic group in Ghana. They practise a matrilineal system of inheritance. The Ewe, the second largest ethnic group, practise the patrilineal system of inheritance. These two ethnic groups exclude widows from inheriting the estates of their deceased husbands. The customary law system of inheritance is fraught with several challenges. These traditional systems of inheritance are hindrances to women's inheritance rights. Customary laws of inheritance are embedded within the cultural context of Ghana, including beliefs and practices related to marriage and the roles of wives.[88] The inheritance rights of women in Ghana depend on the traditions of their lineage. Ghana's customary legal regimes regarding inheritances can be grouped into two main categories: the matrilineal and patrilineal systems of inheritance.[89]

The Akans are the largest ethnic group and make up 48% of Ghana's population.[90] The Akans comprise subgroups defined primarily by their mutually intelligible dialects. The largest groups include the Asante, Akuapem Twi, Akyem, Brong, Fante and Agona.[91] Geographically, the Akans occupy the western, central, and Ashanti regions, parts of the Brong-Ahafo, Volta, eastern regions of Ghana, and the eastern part of the Ivory Coast. The Akans practise the matrilineal system of inheritance, where they trace their descent through a female line.[92] A family's controlling spirit

[87] Alfred R Radcliffe -Brown & Daryll Forde, *African Systems of Kinship and Marriage* (London: Routledge Press,2015)) 1.
[88] Korang-Okrah, *supra* note 1 at 4.
[89] *Ibid* at 4.
[90] *Ibid* at 4.
[91] *Ibid* at 4.
[92] Edward Kutsoati & Randall Morck, *Family Ties, Inheritance Rights and Successful Poverty Alleviation: Evidence from Ghana* (Chicago: University of Chicago Press,2014) 219.

passes from one generation to the next under the matrilineal system of inheritance only through the female bloodlines. It is held that it is through this female bloodline that Akan children inherit their "flesh and blood," which is the origin of their existence.[93] Therefore, under the matrilineal system, an individual is related by blood to the individual's mother, full siblings, and half-siblings by a common mother.[94] Thus, the inheriting group under the matrilineal system includes the man's mother, brothers and sisters, and the children of such sisters. The children of the Akan male do not belong to his bloodline.[95] As such, his children cannot inherit from him. His uterine brothers and sisters are the first in line to inherit from him before his nieces and nephews. As such, there is an Akan proverb that states, "Nniwa mma nsa, wofase nni adee," which means, "if brothers and sisters are there, nephews and nieces do not inherit."[96] The Akan inheritance system follows a particular order. First, the eldest uterine brother, followed by other brothers, and then the senior sister, followed by the other sisters. In cases where there is more than one person who qualifies for the inheritance, certain benchmarks such as the age and achievements of the prospective candidate are taken into consideration.[97]

The customary successor, elected by the lineage, takes charge of the property as a custodian, and controls the management of the estate.[98] A notable characteristic of marriage under indigenous law

[93] Victor Gedzi, *Principles and Practices of Dispute Resolution in Ghana*: *Ewe and Akan Procedures on Females' Inheritance and Property Rights* (PhD Dissertation, Erasmus University,2009)73.
[94] *Ibid* at 73.
[95] *Ibid* at 74.
[96] *Ibid* at 74.
[97] Kofi Awusabo- Asare, "Matriliny and the New Intestate Succession Law of Ghana" (1990) 24:1Can J Afri Stud 1-16.
[98] *Ibid,* see also In *Fynn v Gardiner* (1953) 14 W.A.CA. 260,261- the court held that by the Fante customary law "property of the deceased belonged to the extended family", also in *Ennin v Prah* 1959 JELR 65457 (HC), Justice Adumua Bossman held that "the family succeeds the deceased upon intestacy". In *Vanderpuye v Botchway,* Justice Coussey held that "the extended family is the unit for the purpose of ownership of property. All the members have a joint interest in the family property which is indivisible."

worsens the situation of women. A woman under customary law does not share blood ties with the husband and, as such, cannot inherit the property of the spouse.[99]

> By customary law, it is the domestic responsibility of a man's wife and children to assist him in carrying out the duties of his station in life, such as farming or business. The proceeds of this joint effort of a man and his wife and/or children, and any property which the man acquires with such proceeds are by customary law the individual property of the man. It is not the joint property of the man and the wife and/or the children. The right of the wife and the children is a right to maintenance and support from the husband and father.[100]

A widow does not inherit from her husband if he dies intestate. Fenrich et al. observe that "a wife's labor in Ghana is merely seen as a contribution to satisfy her pre-existing marital obligations and does not give her an ownership stake."[101] The treatment of widows and children under the customary law reflects the perception that they are part of the property itself rather than beneficiaries. For example, the successor of the deceased's estate has a moral obligation to provide for the wife and children of the deceased, including educating the children. [102]

However, widows and children have no legal rights to enforce these responsibilities. The deceased's children may continue to live in their father's house subject to good behaviour as decided by the successor.[103] The surviving wife may re-marry into her husband's matrilineage by marrying the heir to her husband if both parties agree to it.[104] If the successor decides not to marry the widow, the successor may send her off with some token sum.[105] If the surviving wife decides not to marry the successor, her family must return part of the bride price, and any claim she has on

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[99] *Ibid.*
[100] *Quartey v Martey* (1959) GLR 380.
[101] Fenrich & Higgins, *supra* note 5 at 259-341.
[102] Gedzi, "PNDC Law 111 in Ghana", *supra* note 9 at 74; Christine Dawuona- Hammond, "Women, and Inheritance in Ghana" in Akua Kuenyehia, eds, *Women and Law in West Africa: Situational Analysis of Some Key Issues Affecting Women* (Accra: WALWA,1998) 138-139.
[103] *Ibid* at 74.
[104] Takyiwaah Manuh, "Wives, Children and the Intestate Succession in Ghana" in Gwendolyn Mikell, ed, *African Feminism: The Politics of Survival in Sub-Saharan Africa* (Philadelphia: University of Pennsylvania,1997) 81.
[105] Dorothy Dee Vellinga, "The Widow among the Matrilineal Akan of Southern Ghana" in Betty Potash, ed, *Widows in African Societies: Choices and Constraints* (Cambridge: Cambridge University Press,1986) 225.

the estate is terminated.[106] Caring for the widow and children is part of the management of the properties assumed by the customary successor and depends on the initial marriage contract between the families.[107]

A non-governmental organization, Bridge Development and Gender Organization, examined gender issues in Ghana and indicated, among other things, that although technically speaking, a widow under the family system has rights of maintenance and residence through her husband or his successors, "it is common for her to be driven out of the home."[108] However, women contribute directly and indirectly to the acquisition and maintenance of matrimonial property by working on men's farms or running a business.[109] Other women also have their own small businesses, which they use to supplement housekeeping money given to them by their husbands. In her analyses of mothering, work, and gender in Ghana, Clark indicated that Asante women play a major role in keeping the home.[110] This indirectly helps men to save money for the acquisition of matrimonial property. Since most women contribute indirectly to the acquisition and maintenance of property, they have difficulty claiming a fair share of their inheritance after the death of their spouses.[111]

As such, women are advised to keep good relations with their husband's lineage. A good relationship between a wife and her husband's extended family is very important. If the widow had good relations with her husband's relatives before his death, they may give her a portion of

[106] *Ibid* at 220.
[107] Gedzi, "PNDC Law 111 in Ghana", *supra* note 9 at 74.
[108] DFID, UK, Background Paper on Gender Issues in Ghana', Bridge Development-Gender (Report no. 19 Brighton: Institute of Development Studies,1994) 59.
[109] Victor Gedzi, "Property Relations and Women's Access to Courts among the Anlo and the Asante in Ghana" (2012) 29 :8 European Scientific Journal 75.
[110] Gracia Clark, "Mothering, Work and Gender in Urban Asante Ideology and Practice" (1999) 101:4 Amer Anthrop 717-29.
[111] *Ibid* at 718.

the property.[112] However, if there was no good relationship between them, the widow may be ejected from the deceased's house soon after her husband's death. The explanation is that marriage does not concern only the man and woman in Ghana but also their families.[113] Therefore, a wife must respect and be good to her husband's relatives. When a wife fails to establish this good relationship, she will always face problems after the death of her partner.[114] Furthermore, the way the wife treats her husband, particularly in times of sickness such as blindness and stroke, shows whether a wife should be considered on moral grounds for a share in her deceased husband's properties, even if she did not contribute directly to its acquisition and maintenance.[115]

According to Togobo, the widow gets a room to live in if the estate is a house. The widow can choose to live in the house for the rest of her life. However, if she is still young, she can remarry any of the deceased husband's relatives. If she does, she continues to live in the deceased husband's house. However, if she decides to marry outside her husband's extended family, then there is a probability that she will be ejected from her deceased husband's estate.[116] Usually, widows prefer to move from their deceased husband's homes due to the traditional belief that they may develop certain long-term illnesses that may be deadly if they engage in sexual relationships with other men while still living in the deceased's home. Although this belief may not be strong in urban areas in Ghana, it is important to note that the belief is deeply entrenched in rural areas.[117]

[112] Gedzi, "Principles and Practices of Dispute Resolution in Ghana", *supra* note 92 at 74.
[113] *Ibid* at 74.
[114] *Ibid* at 76.
[115] *Ibid* at 76.
[116] *Ibid* at 76.
[117] *Ibid* at 76.

The Ewe is the second largest ethnic group in Ghana. According to Ewe history, the Anlo-Ewe people who currently reside in the southeastern corner of the Republic of Ghana settled in their present home around the later part of the 15th century (1474) after a dramatic breakaway from Nortsie in Togo.[118] The escape and latter resettlement are remembered in a yearly festival known as Hogbetsotso Za.[119] The Ewe people can be found predominately in the Volta region in south eastern Ghana.[120] Others are also found at the borders of Togo. The Ewe language has half of its speakers in Togo. This is due to the 1956 plebiscite, which determined whether British Togoland should be part of the Gold Coast or Togo.[121] It is held that most Ewe voted to be part of the Republic of Togo. As such, there are some Ewe in Ghana and some in Togo. The Ewes in Ghana are made up of sub-nationality groups, including the Anlo Ewe, Mina, Aneho, Danyi, and Tongu or Tonu. [122]

The Ewe practise the patrilineal system of inheritance, where they trace their descent through the male line. A family's controlling spirit passes from generation to generation only through male bloodlines under the patrilineal system.[123] Under patrilineal norms, a man's estate is distributed among his children, who are considered his blood kin. [124] Although children are legally entitled to inherit from their father, female children do not have equal rights as their male siblings. Female children's position to inherit their father's property is a privilege and not a right.[125]

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[118] Gedzi, "PNDC Law 111 in Ghana", *supra* note 9 at 41.
[119] *Ibid* at 41.
[120] Akosua Anyidoho & ME Kropp, *supra* note 73 at 152.
[121] *Ibid* at 152.
[122] *Ibid* at 152.
[123] Gedzi, "Property Relations and Women's access to Courts" *supra* note 109 at 76.
[124] *Ibid* at 76*; see* also Anselmus KP Kludze, *Ewe Law of Property* (London: Sweet and Maxwell,1973) 280. See also in *Khoury v Tamakloe* (1950) DC 48-51, Justice Smith recognised the right of children to inherit the estates of their deceased father. In *Tamakloe v Attipoe* Civil Appeal No.38/1952, the right of children in the patrilineal system to succeed to the interests in intestate property was recognised by the court & also in *Yawoga v Yawoga*, a case from the Ho District of the Volta Region. In this case, the first defendant and his sister, Afua Yawoga, were the only children of the deceased. Justice Ollenu admitted that the children were entitled to the properties of the deceased.
[125] *Ibid* at 76.

A male child is considered before a female child. When there is more than one male child, males also inherit according to seniority of age. For example, in cases of lands, the eldest son is allowed to choose before the youngest male child.[126] Before their death, some men may pass on a portion of their properties over to their daughters, to avoid discrimination and ensuing quarrels. This generally involves letting elders who may be family members and outsiders know about the decision.[127] Traditionally, the outsiders are important as necessary witnesses in case family members try to take the property from the rightful successor after the death of the donor. Usually, this process is sealed with a ritual in which an alcoholic drink is taken.

In polygamous marriages, female children receive equal shares of property with their male siblings.[128] This is to ensure that those female children have a share of the estates of the deceased. If a deceased father didn't have a male child but has only a female child, she may, by tradition and custom, inherit his property. Contrary to the male child, who enjoys permanent interest, a female child only has a short-term interest in the property.[129] When she passes away, her children may be considered to inherit the property only on moral grounds. This means they may be forced to move out of the house if members of the patrilineal family are not pleased with their behaviour. However, some male children who inherit from their fathers do not fulfill any responsibilities attached to the rights they enjoy. In some circumstances, the female child takes up the obligation of maintaining and renovating the deceased father's properties. Some daughters also settle debts incurred by their deceased fathers.[130]

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[126] *Ibid* at 76.
[127] *Ibid* at 80.
[128] *Ibid* at 80.
[129] *Ibid at 80.*
[130] *Ibid* at 80.

When a man dies childless and without a will, his brothers and sisters inherit his estate. Even in this context, brothers are given more inheritance than sisters. This is because the patrilineal lineage system gives more priority to the males and therefore gives them more inheritance rights.[131] The reason behind the priority given to males is that a woman must not build a house or own an estate. Instead, a man must build and own one to shelter his wife and children. When a man can own an estate, he is seen in society as "mature" and "responsible."[132] Both the Akan and Ewe societies do not regard a man who lives in his wife's house. He is accorded no respect and his in-laws may not respect him. Since the Ewe society does not want a man to be disrespected by his in-laws or society in general, they try to refute the idea of men depending on their wives.[133] This is reflected in the local proverb, "Nonu de mebiana o," meaning, "A woman's palm tree does not bear fruits."[134] This proverb aims to discourage men from over-relying on their wives or mothers because the Ewe believe that men who do so do not become successful or productive in life.

Connected with this belief as indicated is that women are not supposed to own property like men. Linked with the explanation that women do not have equal property rights to men among the Ewe is the socially approved phenomenon within the patrilineal system that women do not own children and therefore women do not have the economic responsibility to raise them.[135] Therefore, the family and society think it is not important for women to own property such as land, a productive economic source on which food crops are grown, with the main aim of taking care of the children.

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[131] K E de Graft Johnson, "Succession and Inheritance among the Fanti and Ewe" in Christine Oppong, ed, *A Comparative Study of Current Trends in Domestic Rights and Duties in Southern Ghana* (Ghana: University of Ghana,1974) 257.
[132] *Ibid* at 240.
[133] *Ibid* at 240.
[134] *Ibid* at 242.
[135] *Ibid* at 242.

This is because it is the responsibility of men to take care of their wives and their children. Thus, a man is supposed to choose a wife, bring her under his roof, and take care of her and the offspring he obtains through the union.[136] As a beneficiary of the property, the man maintains it within the family to hand it down to others. By keeping the property in his lineage, a man not only brings about continuity but also helps to immortalize it. Therefore, men are expected to own more property, such as land, to ensure that they can raise a family for this immortalization.[137]

The widows in the patrilineal system do not have access to the estates of their deceased husbands. One reason why there are no provisions made for the surviving spouse in her husband's estate is that her children will take care of her.[138] As such, there is a perception that widows with children within the patrilineal system are better off than matrilineal widows. This is because, under the customary law regulating many patrilineal societies in Ghana, it is the children, not the lineage, that inherit property from the deceased man's properties.[139] According to Togobo, an Ewe oral historian, when children inherit from their deceased fathers, they may use the property to care for their mothers. The children become the social capital or security for their mothers, especially in Ghana, where the welfare system is not very active. If these children take good care of their mothers, they will not be impoverished or left destitute.[140]

The dissimilarities between the matrilineal and patrilineal systems are important mainly because they give rise to different sources of conflict surrounding the devolution of estates. In matrilineal communities, the intestate's sisters, brothers, nephews, and nieces are the main beneficiaries under

[136] *Ibid* at 242.
[137] *Ibid* at 257.
[138] *Ibid* at 257.
[139] *Ibid* at 257.
[140] *Ibid* at 257.

customary law and are therefore more likely to challenge the widow's rights under the statutory regime.[141] On the other hand, in patrilineal societies, conflicts more often arise among children of different mothers when the deceased engaged in a polygamous marriage. This leaves the surviving widows with little or no share of the intestate property.

Most widows are left impoverished after the death of their husbands. This is due to customary law that demands that the family of the deceased inherit his properties.[142] Most of these women are left to care for their children single-handedly. Customary successors fail to maintain the surviving wife and children adequately. Widows' ignorance of the right institutions through which to seek legal redress further exacerbates their challenges in claiming their inheritance rights.[143]

1.5 Conclusion

This chapter discusses the subject matter of my research and lays out the problem. It explains the place of customary law in the inheritance regime and its repercussions on women's inheritance rights. The chapter provides an overview of the Ghanaian legal system and the context of spousal property rights in Ghana.

[141] *Ibid* at 257.
[142] Fenrich & Higgins, *supra* note 5 at 300.
[143] *Ibid* at 300.

Chapter 2: THEORETICAL FRAMEWORKS AND METHODOLOGIES

2.1 Introduction

This chapter elaborates the theoretical frameworks and methodologies used in this research. The methodologies used in this research are the legal doctrinal and legal comparative methodology. The objectives of the legal doctrinal research are to analyse legal rules, principles, and doctrines.[1] The legal doctrinal research also helps to discover the law in legal statutes and judicial precedents. Finally, the legal doctrinal methodology also provides a logical explanation to the law and concurrently points out inconsistencies and uncertainties in the law.[2] The legal doctrinal methodology is relevant and appropriate for this research as I use this methodology to analyse existing legal rules, standards and judicial precedents regulating inheritance rights in Ghana. Analysing these laws and judicial precedents highlights the inconsistencies and gaps in the existing legal framework regulating inheritance rights in Ghana.

The use of the legal doctrinal methodology involves analysing primary and secondary sources. My research relied on data from primary and secondary sources including case laws, books, journals, articles, and discussions in commentaries. My research did not engage in qualitative research which involves interviews, questionnaires, schedule, interview guide and observation. Data from the secondary sources and case laws provided all the relevant information necessary to address the gaps and inconsistencies within the legal framework regulating inheritance rights in Ghana.

[1] Terry Hutchinson & Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research" (2012) 17:1 Deakin L Rev 83-119; see also Vijay M Gawas, "Doctrinal Legal Research Method a Guiding Principle in Reforming the Law and Legal System Towards the Research Development" (2017).
[2] *Ibid.*

I also use the legal comparative methodology in this research. The importance of comparative legal research is to compare the law(s) of one country to that of another. The primary act in comparison is looking at one set of legal data in relationship to another and then evaluating how the two sets of legal data are similar and how they are different.[3] Comparing and contrasting two legal systems helps to discover how laws in a legal system can benefit or improve another legal system.

I apply the legal comparative methodology in my research to explore how the Ghanaian legal framework regulating inheritance is similar and differs from other countries. I particularly look at how the operation of the laws in other jurisdictions can improve the Ghanaian legal framework.

This study deploys two main analytical frameworks to critically analyze the subject matter of women's right of inheritance. These include intersectional feminist legal theory and postcolonial theory. However, this thesis also draws from other theories, specifically the law and society theory and the sociology of law theory. Each theoretical framework has specific defining features; however, there is a common ground that allows these theories to converge and interact to address the injustices and inequalities within the inheritance regime in Ghana. In this chapter, I do not highlight the limitations and differences between the theories, but I focus on their potential to address specific issues in my research. My goal is to highlight the importance of these theoretical approaches and combine their insights to engage in a constructive critique of my research problem.

2.2 POST COLONIAL THEORY

The connection between colonialism and modernity in Ghana is a recurring subject in my thesis. Taiwo asserts that many challenges currently faced by African countries with varying degrees of

[3] Edward J Eberle, "The Methodology of Comparative Law" (2011) ½:16 Roger Williams University L Rev 66.

intensity can be traced to the enduring effects of colonization.[4] In-so-far as this thesis focuses on aspects of Ghana's colonial legal legacy, it is prudent that I use a theory that addresses these complexities. However, a comprehensive account of the complex colonial legal ideas and practices introduced into Ghana falls outside the ambit of this thesis. My research focuses on analyzing the effects of certain colonial legal legacies on customary law that have influenced the inheritance regime in Ghana. To make this analysis, I use postcolonial theory.

Postcolonial theory is the study of the cultural, political, and legal legacy of colonialism on colonized people. According to Peter Fitzpatrick and Eve Darian-Smith, postcolonialism is now the main mode in which the West's relation to its "other" is critically explored.[5] Postcolonial theory's status as a discipline is arguably more established in other academic areas. Recently, legal scholars are progressively recognizing it as a theoretical tool to examine the nature of legal discourse.[6] Discussions at the heart of contemporary postcolonial legal theory centre on the role of the law as an integral element of the colonial, imperial, and now postcolonial projects. I use this theory in my research for two main reasons.

First, postcolonial theory focuses on how components of the colonial discourse continuously exert a strong impact on the legal systems of most post colonies.[7] Colonizing powers exported their laws to the colonised territories.[8] These colonial powers did not consider whether their colonies acknowledged the legitimacy of those laws.[9] Neither did these colonial powers consider the effects

[4] Olufemi Taiwo, *How Colonialism Pre-empted Modernity in Africa* (Indiana: Indiana University Press,2010) 3.
[5] Peter Fitzpatrick & Eve Darian Smith, "Laws of the Postcolonial: An Insistent Introduction" in Fitzpatrick & Darian Smith, eds, *Laws of the Postcolonial* (Michigan: University of Michigan Press, 1999).
[6] Alpana Roy, "Post-Colonial Theory and Law: A Critical Introduction" (2008) 29: ½ Adel L Rev 315-358.
[7] Philipp Dann & Felix Hanschmann, "Post-colonial Theories and Law" (2012) 45:2 Verfassung und Recht in Ubersee/Law and Politics in Africa, Asia, and Latin America 123-127.
[8] *Ibid* at 125.
[9] Alexander Anievas & Karem Anievas, "Limits of the Universal: The Promises and Pitfalls of Postcolonial Theory and its Critique" (2017) 25:3 Historical Materialism 36-75.

of their laws on the existing customary laws of their colonies. In Ghana, laws essentially remain an "Eurocentric enterprise" in many ways.[10] These colonial laws have effects on customary laws, which have consequently affected the inheritance rights of women. I am of the view that the search for solutions to the inequality women face in the inheritance regime continues to ignore Ghana's colonial encounter and how women's struggle for equality is linked to the legacy of this encounter in modern-day Ghana.[11] Using postcolonial theory, I identify the numerous ways in which the recent orderings in postcolonial Ghana continue to reflect its colonial origins.[12] Additionally, using this theory, I examine the legitimacy and importance of the colonial laws on which Ghana has built most of its legislation, particularly those relating to inheritance and succession. I also explore how to decolonize the colonial foundations of the current legal framework regulating the property and inheritance rights of women in Ghana, especially the aspects of the law that are outdated. Decolonization is breaking away from the Eurocentric perspectives of law imposed on colonies during colonialism.[13] The decolonization process will require "defining law from a non-colonial position and alternative legal epistemologies."[14] In this regard, decolonization will draw from diverse sources of law and normative agencies to enhance the transformative potential of law in attaining more social and economic justice.[15]

Secondly, postcolonial theory also establishes intellectual spaces for subaltern peoples. The subaltern refers to people of lower social status who are marginalized and subjected to oppression.

[10] Roy, *supra* note 5 at 315.
[11] Ato Quayson, "Postcolonialism and Postmodernism" in Henry Schwartz & Sangeeta Ray, eds, *A Companion to Postcolonial Studies* (Oxford: Blackwell Publishing,2005) 87-111.
[12] Stacy-Ann Elvy, "A Postcolonial Theory of Spousal Rape: The Caribbean and Beyond" (2015) 22 Mich. J. Gender & L. 89 at 98.
[13] *Ibid* at 5.
[14] *Ibid* at 5.
[15] *Ibid* at 5.

The marginalized group of people includes women who are left to struggle to speak for themselves in their voices.[16] The question of the subaltern is at the core of contemporary debates in the postcolonial discourse. Postcolonial scholars such as Spivak have stated that there is a link between colonialism and patriarchy.[17] Spivak uses the word "subaltern" to refer to the oppressed subjects. She argues that it is not possible for the subaltern to speak. She centres her argument on the problem of widow immolation or sati in colonial India. Sati was a practice where a Hindu widow ascended the pyre of the deceased husband and immolated herself.[18] Colonialism exacerbated patriarchal systems. She insists that "colonialism and patriarchy operate not as separate, but two mutually supporting systems of domination that intersect in the lives of the subaltern sexed subject."[19] Based on this theory, my thesis interrogates the link between patriarchy and colonialism and its effects on women's inheritance rights in postcolonial Ghana. I explore ways in which colonial rule reinforced patriarchy in the Ghanaian legal system. I also investigate the extent to which colonialism silenced the subaltern. This entails finding out whether Ghanaian women had a voice in the legal system under colonial rule and continue to have a voice in the present day.

Though a very helpful framework, postcolonial theory has major setbacks. Postcolonial theory focuses on "others," "subordinates" and the "minority."[20] Even though postcolonial theory establishes intellectual spaces for subaltern peoples such as women , the theory fails to address the interlocking nature of women's oppression.[21] Mills criticizes postcolonial theory for being gender

[16] Roy, *supra* note 5 at 88.
[17] *Ibid* at 90.
[18] *Ibid* at 90.
[19] *Ibid* at 90.
[20] Yaag Geng & Zhang Qiue, "The Essence, Characteristics and Limitation of Post-Colonialism: from Karl Marx's Point of View" (2006) 1:2 Frontiers of Philosophy in China 279-294.
[21] Beatrice Hibou, "Doing Postcolonial Studies Differently: Interview with Mohammed Tozy" (2013) 7:4 International Political Sociology 444.

insensitive.[22] Feminists disagree with postcolonial theorists on their understanding of "third world women" and the gender hierarchies in racialized spaces. Chandra Talpade-Mohanty writes about the absence of the acknowledgment of "difference" in understandings of the global oppression of women, as she persuasively draws attention to discursive colonialism in the production of the "third world woman" as a singular monolithic subject in some Western texts.[23] The gender insensitivity associated with postcolonial theory requires that my research uses a more gender-focused theory that will address the interlocking nature of women's oppression in my research. That is where feminists' intersectionality fills the gap.

2.3 FEMINIST LEGAL THEORY

Feminist legal theory consists of liberal, cultural, radical, intersectional, and other strands of feminism. My research employs intersectional feminist legal theory. Intersectional feminism can be traced to Black feminism. Its antecedents include concepts of "double jeopardy, multiple jeopardy, and interlocking oppressions."[24] In the United States during the 19th century, Black feminists used intersectionality to challenge the simultaneity of a "woman question" and a "race problem."[25] Later, the concept was expanded and made popular by Kimberlie Williams Crenshaw, a Black feminist legal scholar. Intersectionality has become one of the most recognized paradigms associated with third-wave feminism.[26] In addition, the theory has been acknowledged as an essential contribution to women's studies.

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[22] Sara Mills, *Discourses of Differences: An Analysis of Women's Travel Writings and Colonialism* (London, UK: Routledge Press,1991).
[23] Chandra T Mohanty, "Under Western Eyes: Feminist Scholarship and Colonial Discourses" (1984) 12/3:2 Boundary 333-358.
[24] Anna Carastathis, "The Concept of Intersectionality in Feminist Theory" (2014) 9:5 Philosophy Compass 304-314.
[25] *Ibid* at 305.
[26]Chavez Mansela et al, *No Permanent Waves: Recasting Histories of US Feminism (*New Jersey: Rutgers University Press, 2010) 99.

The concept of intersectionality refers to a series of cross-disciplinary interventions that analyzed how the intersection between inequalities such as race, gender, and class shape women's lives and structure the social location of specific groups of women of colour in distinctive ways.[27] For instance, Kimberlie Crenshaw's ground-breaking work analyzed the relationships between gender, race, and the law in the United States. In one of her works on violence against women, she examined how both experiences of such violence, and the effects of institutional and political responses were structured in distinctive ways by the intersections of race and gender.[28] According to her, the experience of being a Black woman cannot be understood in independent terms of either being Black or a woman. Instead, it must include the interactions between the two identities, which, she adds, continually reinforce one another.[29]

Crenshaw identifies three main types of intersectionality: structural, political, and representational intersectionality. Structural intersectionality explains the ways in which classism, sexism and racism intersect and oppress women of colour while shaping their experiences in various areas. Crenshaw's examination of structural intersectionality was used during her field study of abused women.[30] In this study, Crenshaw employs intersectionality to show the multilayered oppressions faced by women in relationships with intimate partner violence. Political intersectionality shows two conflicting systems in the political arena, which differentiates women and women of colour into subordinate groups.[31] The experience of women of colour is different from those of white

[27] *Ibid* at 100.
[28] Kimberlie Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Colour" (1991) 43:6 Stan L Rev 1241.
[29] *Ibid* at 1242.
[30] *Ibid* at 1242.
[31] *Ibid* at 1242.

women and men of colour because of the intersection of their race and gender. White women experience gender bias, and men of colour also experience racial bias, but both groups' experiences differ from that of women of colour because women of colour suffer both racial and gender discrimination.[32] Crenshaw states that a political failure of the antiracist and feminist discourses was the exclusion of the intersection of race and gender, which places importance on the interest of "people of colour" and "women."[33]

The last type of intersectionality stated by Crenshaw is representational intersectionality, which suggests the production of imagery that is supportive of women of colour. This type of intersectionality criticizes sexist and racist subordination of women of colour in representation. Representational intersectionality focuses on the essence of women of colour having representation in contemporary settings. For the sake of this research, I will use structural intersectionality and highlight some structural risk factors that contribute to the discrimination women face in accessing their inheritance rights in Ghana.[34] Using structural intersectionality in this thesis highlights the multilayered discrimination that women face in claiming their inheritance rights. My research will apply intersectionality as an analytical framework as it serves as a tool that points out how the multiple identities of women produce unique experiences of oppression.[35] Additionally, intersectionality highlights how laws, policies, and strategies to address discrimination must account for the interlocking nature of oppression by continuing to ask questions about the interlocking nature of identity.[36] This makes intersectionality particularly

[32] *Ibid* at 1242.
[33] *Ibid* at 1244.
[34] *Ibid* at 1244.
[35] Chavez, *supra* note 25 at 100.
[36] *Ibid* at 100.

imperative for my research, as any goal for the protection of human rights that focuses wholly on identity but does not integrate an intersectional understanding of oppression is intrinsically defective.[37]

To effectively address women's inheritance rights in Ghana, the multiple identities of Ghanaian women, which reflect an intersection of gender, class (rich and poor), ethnic identity, and geographical location (rural and urban), must be taken into consideration to address the root causes of their discrimination effectively.[38] According to Article 17(2) of the 1992 Constitution, "a person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status."[39] Ghanaian courts have been using a unidimensional approach to analyzing discrimination against women, relying on the undifferentiated category of gender. The courts have been using gender to analyze discrimination in intestate succession cases. This does not favour women if the courts apply the customary law of succession which favours the extended family at the detriment of the widow.[40] According to the customary law of succession, a woman's assistance in the acquisition and maintenance of matrimonial property is regarded as a domestic responsibility. This principle under customary law of succession discriminates against women. The court's analysis of discrimination based on a single identity trait does not adequately account for intersecting aspects of identity such as gender, class, ethnic identity, and geographic location which contribute to the inequality women face in claiming their inheritance rights.[41] As a

[37] *Ibid* at 100.
[38] Crenshaw, *supra* note 27 at 1242.
[39] 1992 Constitution of Ghana, art 17(2).
[40] In *Quartey V Martey* (1959*)* GLR 308, the court considered the efforts of the widow in assisting the husband in acquiring matrimonial property as a domestic responsibility.
[41]Suzanne Goldberg*, Intersectionality in Theory and Practice: Intersectionality and Beyond (*Oxfordshire, UK*:* Routledge-Cavendish Publishing, 2008) 140.

result, women have not received the right remedies for the discrimination they face due to the failure of the court to use an intersectional approach.

In Ghana, evidence of this vulnerability tends to be of a structural nature. The principal structural risk factors are poverty and illiteracy.[42] I address violence as another risk factor, as women are victims and targets of violence, which hinders them from seeking legal redress in discrimination cases. In Ghana, there is the feminization of poverty.[43] The majority of those who are poor in Ghana are women.[44] According to research by OXFAM International, only 6% of the wealthiest people in Ghana are women.[45] OXFAM International further estimates that "one of the richest men in Ghana earns more in a month than one of the poorest women could earn in 1000 years."[46] Poverty reduces women's chances to acquire higher education, which limits their employment opportunities, which again is linked to the lack of economic success.[47] The lack of financial means also limits women's access to courts to seek legal redress, especially when facing discrimination. According to a survey of 322 widows in both the matrilineal and patrilineal communities, only 5.2% reported either a single or joint bank account.[48] The court can grant letters of administration. A letter of administration is the authority to administer the estate of someone who has died without making a will, to the families of the deceased.[49]

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[42] *Ibid* at 135.
[43] Amber Peterman, "Widowhood and Asset Inheritance in Sub-Saharan Africa: Empirical Evidence from 15 Countries" (2012) 30:5 Dev Policy Rev 543.
[44] *Ibid* at 543.
[45] OXFAM International, Ghana: Extreme Inequality in Numbers (2021), Online: <http://www.oxfam.org/fr/node/7547.>
[46] *Ibid.*
[47] Timo Makonnen, Multiple, *Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalised to the Fore* (LLM Dissertation, Abo Akademi University, 2002) 23.
[48] Edward Kutsoati & Morck, Randall, Family *Ties, Inheritance* Rights and Successful Poverty *Alleviation: Evidence* from *Ghana, African Successes:* Human Capital (Chicago: University of Chicago Press,2014) 230.
[49] *Ibid* at 226.

In Ghana, for a widow's petition for letters of administration from the courts to be approved, she must attain competent legal advice to execute this document accurately as any procedural errors annul her case. In addition to the high cost of legal services is the cost of the deceased's funeral and burial rites, which the widow must pay in totality should she contest the customary law.[50] The financial disadvantages faced by women prevent them from going through such legal processes to claim their inheritance rights.

Besides poverty, illiteracy is also a significant factor of the disadvantage.[51] According to the same survey of 322 widows, 50% had no formal education and no knowledge of the law.[52] Women in rural areas are especially ignorant of the law and the rights they are entitled to under the law. Statistically, the literacy rate for women in urban Ghana is 57%, while in rural areas the literacy rate is 28.3%.[53] As such, women living in rural areas in both matrilineal and patrilineal communities continue to follow norms associated with the traditional system of inheritance. Like Jewkes, I am of the view that education confers on women's social empowerment, self-confidence, and the ability to use information and resources to their own advantage.[54] Women cannot claim their inheritance rights if they do not know their rights and cannot file for legal redress.

Another factor which contributes to the discrimination women face in claiming their inheritance is violence. In Ghana, most widows are subjected to physical, emotional, and psychological abuse

[50] *Ibid* at 226.
[51] Unifem, Integrating Gender into The Third World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (2001) at para 23, online:<www.unifem.undp.org/hr_racism.html>.
[52] Kutsoati & Morck, *supra* note 47 at 230.
[53] Jean Marie Fenrich & Tracy Higgins, "Promise Unfulfilled: Law, Culture and Women's Inheritance Rights in Ghana" (2001) 25:2 Fordham Intl LJ 259.
[54] Rachel Jewkes, "Intimate Partner Violence: Causes and Prevention" (2002) 9315:359 Lancet 1423-1429.

by the extended family members of the deceased.[55] For the extended family to take over the properties of the deceased, most widows are usually displaced from their homes and subjected to physical abuse, including beating and ill-treatment. In addition, some are accused of being responsible for the death of their husbands and must go through customary widowhood rites to prove their innocence.[56] These widowhood rites include public crying/wailing for 15 days, starvation (eating once a day), cold water bathing three times a day and sleeping on a mat instead of a mattress for 40 days. [57] An interview conducted with ten widows (three Muslims and seven Christians) who performed the Akan widowhood rites (Kunadie) showed that they undergo very painful widowhood rites.[58]

Due to this physical, emotional, and psychological abuse, many women do not want to push further in contesting their claims over property. Instead, they would let the extended family keep the estate to be at peace with the extended family.[59] By contrast, widowers in Ghana rarely experience the same level of emotional and psychological abuse from the family of their deceased wives.[60] Widowers do not observe rites after the death of their wives.[61] Most men inherit their deceased wives' property without any form of hindrance from the family of the deceased wife.[62] An Akan Ghanaian proverb that supports the right of men to inherit the property of their deceased wives says, "obaa to tuo etwere obarima dan mu," meaning, "if a woman buys a gun, it is a man who

[55]Victor Gedzi, ''PNDC Law 111 in Ghana and International Human Rights Law'' (2014) 2:2 Global Journal of Politics and Law Research 116.
[56]*Ibid* at 117.
[57] Rose Korang- Okrang & Wendy Height, "Ghanaian (Akan) Women's Experiences of Widowhood and Property Rights Violations: An Ethnographic Inquiry" (2015) 14:2 Qualitative Social Work 122-24.
[58] *Ibid* at 123.
[59] *Ibid* at 124.
[60]Gedzi, "PNDC Law 111 in Ghana", *supra* note 54 at 117.
[61] Korang- Okrang & Height, *supra* note 56 at 124.
[62]Gedzi, "PNDC Law 111 in Ghana", *supra* note 54 at 117.

keeps it."[63] This Ghanaian proverb indicates that women are not supposed to be economically productive as men are, and even if they are, men are supposed to inherit and control their resources.[64]

Widows in Ghana do not only face gender discrimination, but other intersecting factors such as poverty, illiteracy, and violence contribute to the discrimination women face in claiming their inheritance rights. Applying the intersectional approach in my research will uncover the right measures of redress, including socio-legal approaches appropriate to eliminate gender inequality and its interrelated inequalities in the inheritance regime. I also highlight and examine the social structures that inform women's experiences using the intersectional approach.[65] Taking such a "broader approach" will improve the understanding of discrimination and how the court can tackle discrimination more effectively.[66] This framework will not only highlight how the multiple identities of Ghanaian women function together, but intersectionality also has a transformative goal of deconstructing and dismantling systems of power and oppression. Applying this theory together with postcolonial theory in my research will therefore help deconstruct the discriminatory elements of customary law and shape the law to address women's inheritance rights.

[63] *Ibid* at 117.
[64] *Ibid* at 117.
[65] *Ibid* at 117.
[66] *Ibid* at 117.

2.4 LAW AND SOCIETY AND THE SOCIOLOGY OF LAW THEORY

LAW AND SOCIETY THEORY

The study of law and society relies on the belief that laws, and court decisions must be understood in context. Law and society theory dates to the late 1950s.[67] The philosophical foundations of law and society theory lie in the jurisprudential writings of the legal realists, who regarded law as not independent of the social world, but deeply ingrained in society. Law and society is a multidisciplinary field of research made up of diverse approaches to the study of law in society.[68] These are brought together by a common epistemology that views law as a social construct and argues that law reformers should study law and all its manifestations empirically and contextually.[69] Law and society also arose as an extension of legal realism's effort to criticize authorities' point of view of legal concepts, which did not reflect the opinions of their subjects.[70] Another influence that led to the development of law and society was the sociological jurisprudence of Roscoe Pound.[71] Pound critiqued the late 19th century classical legal thought for losing touch with society's needs.[72] As such, Pound asserted that there is a gap between "law in the books" and "law in action."[73] Therefore, the law and society theory fills this gap by emphasizing that law is embedded within society and considering how the law both reflects and impacts culture.[74] As an interdisciplinary theory, law and society points to how the law is socially constructed and how inequalities are reinforced in legal procedures and institutions.[75]

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[67] Lynn Mather, *Law, and Society* (Oxford: Oxford University Press,2018) 2.
[68] *Ibid* at 2.
[69] *Ibid* at 2.
[70] Laura Kalman, *Legal Realism at Yale 1927-1960*, 2nd ed (New Jersey: Law book Exchange Ltd, 2010).
[71] James A Gardner, "The Sociological Jurisprudence of Roscoe Pound" (1962) 7 Vill L Rev 1.
[72] *Ibid*.
[73] Roscoe Pound, "Law in the Books and Law in Action" (1910) 44 Am L Rev 12.
[74] Mather, *supra* note 66 at 2.
[75] *Ibid* at 3.

In most cases, the Ghanaian judiciary has not given customary law "the necessary space to evolve" but has rather "fossilized and stone-walled the law which distorts its mutable nature and subverts its operation."[76] Judicial customary law, which is "law in the books," is static as the judiciary does not consider the social realities within Ghanaian society .[77] As such, Falk-Moore states that there is a gap between social reality and the law.[78] The gap between the law and social reality denies women their inheritance rights as judicial customary law does not consider socio-economic changes.[79] These social-economic changes include urbanization, industrialization, globalization, and women's current monetary and indirect contributions towards the acquisition and maintenance of matrimonial property, which the court does not recognize.[80] Traditionally, women were considered fit to keep the home. Wives stayed at home to cook and take care of their children and husbands. [81] They depended solely on their husbands for their livelihood. However, Ghanaian society has undergone remarkable socio-economic changes. Education has opened new avenues for women, and as a result, women are currently integrated into the labour market, competing with their male counterparts at all levels. According to Caldwell, three-fifths of Ghanaian women are in employment rather than "home duties."[82] Wives are now gainfully employed. Those who stay at home earn money by engaging in crafts such as baking, sewing, and trading.[83] Women are taking on increased duties and can provide items for household use, including food and clothes, and pay

[76] Anthony C Diala, "The Concept of Living Customary Law: A Critique" (2017) 49:2 J Leg Pluralism &Unofficial L 143.
[77] *Ibid* at 143.
[78] Sally Falk-Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" (1973) 7:4 Law & Soc'y Rev 719-746.
[79] *Ibid* at 720.
[80] Elizabeth Acheampong, "Matrimonial Property Division at Marriage Breakdown: The Way Forward" (2007) 4 KNUST LJ 78.
[81] Elizabeth Ardayifio-Schandorf, *The Changing Family in Ghana* (Accra: Ghana Universities Press,1952) 2.
[82]John C Caldwell, *Population Growth and Family Change in Africa: The New Urban Elite in Ghana* (Canberra: Australian National University Press,1968) 29.
[83] Christine Oppong, *Growing up in Dagbon* (Accra: Ghana Publishing Corporation,1973) 13.

for domestic help. They also support their husbands by channelling their salaries into the building and maintenance of their matrimonial home.[84]

Like Halperin, I am of the view that the "law in the books" should not remain motionless and faithful to the traditional way of life but should continuously strive to identify, measure, track and understand changes in normative facts and how these changes impact the legal sphere.[85] Using the law and society theory, I examine how the court can facilitate interaction between the "law in the books" and the "law in action" to promote the inheritance rights of women. I use this theory to investigate certain contextual and social realities that have been overlooked in the application of judicial customary law in Ghana.[86] I also explore some of the court's challenges in ascertaining and applying a living customary law that reflects changes in society.

2.5 SOCIOLOGY OF LAW THEORY

Closely in line with the law and society theory is the sociology of law theory. The sociology of law theory was for some time primarily part of the multidisciplinary field of law and society studies or the law and society movement. Still, it has developed into a relatively independent branch of theory and research in sociology in more recent years.[87] The sociology of law refers to the "sociological study of law and law-related phenomena, whereby law is typically conceived as the whole of legal norms in society as well as the practices and institutions that are associated with those norms."[88] The theory has two types: a top-down model and a bottom-up model. The top-

[84] *Ibid* at 10.
[85] Jean-Louis Halperin, "Law in Books and Law in Action: The Problem of Legal Change" (2011) 64:1/4 Maine L Rev 45.
[86] Pound, *supra* note 72 at 12-36.
[87] Mathieu Deflem, *Sociology of Law: Visions of a Scholarly Tradition* (Cambridge UK: Cambridge University Press,2008).
[88] *Ibid* at 1.

down model regards the state as the source of law and legality and takes the attitudes and concepts of law officials and administrators, that is, those responsible for the interpretation, application and implementation of legal rules, as the point of departure for investigating the impacts of legislation on social patterns of behaviour and social conditions.[89] On the other hand, the bottom-up model considers what ordinary people perceive and experience as the law and how they use this understanding to shape their everyday relationships and collective activities.

My research will specifically use the "bottom-up model" of this theory, as it portrays law and legality not as an autonomous system consisting of rules and formal procedures but as an integral and important aspect of the cultural life of modern society.[90]

First, the sociology of law theory highlights how ordinary people use the law to organize their daily life and how social institutions and organizations condition the way law is employed and legality is realized, rather than how the law is interpreted and enforced by officials of the legal system.[91] Secondly, applying the bottom-up model will create what Sally Falk Moore calls a "semi-autonomous social field," a field of social interaction that lies outside the realm of state law.[92] Creating a semi-autonomous social field will ensure that the domain of law and legality is not restricted to official sources of state law, for the law is regarded as sociologically "thicker" (or more complex) than state law but "thinner" (or sociologically less complex) than the social interactions and institutional arrangements which lay the basis for social order. When focusing on the law, we lose sight of the fact that these fields "have their own customs and rules and the means

[89] Reza Banakar, *Sociology of Law* (London: University of Westminster,2011) 5.
[90]Susan S Silbey, "After Legal Consciousness" (2005)1Annu Rev Law & Soc Sci 323.
[91]Per Stjernquist, *Organised Co-operation Facing Law: An Anthropological Study* (Stockholm: Almquist and Wiksell International, 2000).
[92] Sally Falk- Moore, "Law and Social Change: The Semi-Autonomous Social Field as An Appropriate Subject of Study" (1973)7:4 Law & Soc'y Rev 719 at 746.

of coercing or inducing compliance."[93] Not surprisingly, policymakers have traditionally preferred to promote top-down research, which equates law with state law, giving rise to "the pull of the policy audience." "The pull of the policy audience" is a situation where the laws do not achieve their desired or anticipated goals because the laws do not take complete account of the opinions or, socio-economic and cultural realities of the policy audience.[94]

A significant question that remains is whether the judicial modifications of customary law rules automatically affect their practice by members of the communities in Ghana.[95] According to Hammond, judge-made customary law is rarely implemented in local communities.[96] This is because judicial customary law only reflects the opinions and discretion of judicial officers based on evidence given to them.[97] However, the conservative respecters of their custom sees the authority and source of the rules of customary law as lying beyond the determination and qualification by judicial decisions.[98] According to Kamau, customary laws are the unwritten rules and practices of a group of people based on a general consensus on certain fundamental principles.[99] Therefore, the test of the validity of customary law rules should be their acceptance by the people instead of the sole pronouncement of judges.

Furthermore, the law is inseparable from society. As such, "legal arrangements alone cannot control social arrangements since the law is a subset of the social universe and that society controls

[93] *Ibid* at 721.
[94] Austin Sarat & Susan Silbey, "The Pull of the Policy Audience" (1988)10:2/3 Law &Pol'y 97-166.
[95] Joseph B Akamba & Isidore Kwadwo Tufuor, "The Future of Customary Law in Ghana" in Jean Marie Fenrich et al, eds, *The Future of Living Customary Law* (Cambridge: Cambridge University Press,2011) 220.
[96] Ama Hammond, *Towards an Inclusive Vision of Law Reform and Legal Pluralism in Ghana* (PhD Dissertation, University of British Colombia, 2016) 15.
Anthony C Diala, "A Critique of the Judicial Attitude Towards Matrimonial Property Rights under Customary Law in Nigeria's Southern States" (2018) 18:1 AHRLJ 103.
[98] *Ibid* at 103.
[99] Winifred Kamau, "Judicial Approaches to the Applicability of Customary Law to Succession Disputes in Kenya" (2015) 15 E. Afr. LJ 143.

the law and not the other way around."[100] I use the sociology of law theory to ascertain how law reformers can facilitate a bottom-up interaction to enhance women's inheritance rights. I also use this theory together with the law and society theory to investigate how the law can reflect society.

2.6 Conclusion

This chapter discussed the importance of the various theories and research methodologies used in the multiple fields of inquiry in this dissertation. This research deploys the legal doctrinal and legal comparative methodology. The legal doctrinal methodology involves the use of primary and secondary sources to analyse legal concepts, principles, and doctrines. The analysis of legal principles and doctrines highlights the gaps and inconsistencies in the legal framework regulating inheritance. The objective of the legal comparative methodology is to compare laws of different legal systems. I apply the legal comparative methodology to explore how the operation of the laws in other jurisdictions can improve the Ghanaian legal framework regulating inheritance.

My choice of theories highlights the different dimensions of this dissertation, and although conceptually distinct, they complement each other in numerous ways.

My thesis uses these four theoretical frameworks: postcolonial theory, intersectional feminism, law and society, sociology of law. Postcolonial theory emphasizes how colonial legal structures influence a major aspect of Ghana's legal experience. By using postcolonial theory, I investigate the contemporary relevance and validity of colonial legislation regulating the inheritance regime. Intersectional feminism focuses on the interlocking nature of discrimination against women and how different factors such as poverty, illiteracy, and violence combine to cause discrimination

[100] Glynn Cochrane, *Development Anthropology* (New York: Oxford University Press,1971) 94.

against women. Law and society and sociology of law theories also address the gap between the "law in the books" and the law practised by the people.

One or two theories will not adequately address my research problems. The gap between the "law in books" and the "law in action" cannot be addressed effectively by the postcolonial theory and/or intersectional feminist theory. There is a need for a robust and comprehensive theory that will effectively address the gap between judicial customary law and living customary law. The law and society theory and the sociology of law theory address this gap effectively. The use of the four theories is not only valuable but imperative in this research. Although these theoretical frameworks differ in substance, the theories combine to unveil and address the inequality women face within the inheritance regime in Ghana.

CHAPTER 3: THE PRINCIPLE OF JUDICIAL PRECEDENT: THE ROLE OF THE COURT AND OTHER STAKEHOLDERS IN THE DEVELOPMENT OF CUSTOMARY LAW

3.1 Introduction

This chapter highlights the English Common Law system of judge-made laws and the reliance on precedents in deciding future cases. A precedent is a staple feature of the common law legal tradition, which requires courts to follow decisions reached in previous cases, thereby transforming the decisions in individual cases into a source of law.[1] The Ghanaian courts apply the doctrine of judicial precedent, as it forms part of the English common law introduced to the country during its colonization.[2] First, I provide the historical foundation of this law, particularly explaining how the doctrine of judicial precedent was introduced and applied in the colonial era. Second, I examine the efficacy of the doctrine of judicial precedent and how it adversely affects women's inheritance rights in postcolonial Ghana.

Thirdly, this chapter investigates the role of the court, its approach and trends in interpreting and applying customary law to address discrimination. Finally, I examine whether the court's respond to the need for change and show an understanding of the existing social and economic conditions which are important areas of intersectionality required to achieve effective reform.

[1] Lamond Grant, "Precedent" (2007-09) 5:2 Philosophy Compass 699-711.
[2]Enyinnaya Nwauche, "The Constitutional Challenge of the Integration and Interaction of Customary and the Received English Common Law in Nigeria and Ghana" (2010) 25 Tul.Eur.& Civ.LF 43.

3.2 Historical foundations of the doctrine of judicial precedent in the Gold Coast

The British set up a legal government structure in the Colony of the Gold Coast (Ghana).[3] The British knew that Ghanaians were regulated in their daily affairs by bodies of social norms which the people regarded as binding.[4] However, the British wanted to set up a court system using British judges trained in the common law. Therefore, it was important to determine what should be done about the customary law of the people.[5] Section 19 of the Supreme Court Ordinance gave the court the jurisdiction to implement and apply customary law. Ghana is a multi-ethnic state with numerous cultural and linguistic units.[6] Due to the vast variations in and complexities of local and tribal customs, customary law had to be proved until the particular customs had, by frequent proof in the courts, become so notorious that the courts took judicial notice of them.[7] The Privy Council first established the rule of judicial notice in the case of *Angu v Atta.*[8] The Judicial Committee of the Privy Council also approved of this rule in the later Gold Coast case of *Amissah v Krabah,*[9] where it noted that

> Their Lordships have not been informed of any customary law so established by judicial notice, and they may observe that it would be very convenient if the courts in West Africa in suitable cases, would rule as to the native customs of which they think it proper to take judicial notice, specifying, of course, the tribes or districts concerned and taking steps to see that these rulings are reported in a readily accessible form.[10]

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[3] *Ibid* at 43.
[4] Gordon R Woodman, "Customary Law, State Courts and the Notion of Institutionalization of Norms in Ghana and Nigeria" in Anthony Allott & Gordon R Woodman, eds, *People's Law and State Law* (The Bellagio papers. Berlin, New York: De Gruyter Mouton,2011).
[5] *Ibid*.
[6] Daniel Korang, "Ascertainment of Customary Law: A Question of Law or of Facts or Both" (2015) 38 Journal of Law, Policy & Globalization 3.
[7] *Angu v Attah*, (1916) Gold Coast Privy Council Judgements (1874-1928) 43.
[8] *Ibid.* This case was an appeal from a judgement of a full Court of the Supreme Court of the Gold Coast Colony in action in which the present appellant was plaintiff and the present respondent was defendant, overturning a judgement which the appellant had gained in his favour on a trial before a single Judge of the Supreme Court, sitting as a Divisional Court.
[9] *Ibid,* see also *Amissah v Krabah* (1936)2 W.A.C.A 30(P C) 31.
Ibid.

According to Allott:

> This rule of judicial notice used in *Angu v Atta* appears to have been borrowed from the law of *England* relating to the proof of usage in trades and professions to vary the existing terms of, or annex implied terms to, a contract. Now the principle upon which usage is admitted is essentially that it is notorious, and that is thereby to form an implied term in a contract of the type affected by it. But customary law is not an implied term or series of implied terms; it applies whether a particular person was aware of its existence, or had turned his attention to its existence, or not.[11]

Having established the rule of judicial notice in the Gold Coast, who were the eligible witnesses to customary law? A person is qualified to testify as an expert if he satisfies the court that he is an expert on the subject to which his testimony relates by reason of his special skill and training.[12] Chiefs and elders who had special knowledge of existing customary laws such as property rights were called to give oral evidence.[13] British judges were of the view that "the real customary law was in the minds of the oldest men."[14] Ubink classifies these men as "knowledge devices" through which the court ascertained customary law.[15] Experts could give evidence of actual occasions in the past when a particular incidence took place. Allott classifies these types of experts as the "witnesses of facts."[16] For example, in *Angu v Attah*, the evidence called by the plaintiff was the evidence of the linguist of the Paramount Chief of Lower Wassau. The linguist can be described as a witness of fact.[17] The linguist was able to make specific reference to facts, including the name of the chief at the time, who by custom was entitled to tribute from the lands of Bortogyina to the

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[11] Anthony Allott, "The Judicial Ascertainment of Customary Law in British Africa" (1957) 20:3 Mod L Rev 260.
[12] *Ibid* at 262.
[13] Anthony C Diala, "A Critique of Judicial Attitude towards Matrimonial Property Rights under Customary Law in Nigeria's Southern States" (2018) 18:1 AHRLJ 108.
[14] Martin Chanock, *Law*, *Custom and Social Order: The Colonial Experiences in Malawi and Zambia* (Cambridge: Cambridge University Press,1981) 11.
[15] Janine Ubink, "The Quest for Customary Law in African State Courts in the Future of African Customary Law" in Jean-Marie Fenrich et al, eds, *The Future of African Customary Law* (Cambridge University Press,2011) 93.
[16] Allott, "Judicial Ascertainment of Customary Law", *supra* note 11 at 248.
[17] *Angu v Attah*, *supra* note 7.

appellant.[18] Experts could also give their opinion of customary law on a topic by providing the specific occasions when the custom they gave evidence of had been followed.[19]

The Supreme Court could ascertain customary law by writing a letter to a local chief in which they asked the chief to give his opinion on the case stated. In other instances, the Supreme Court also referred a question of customary law to a traditional authority.[20] For example, in the case of *Sackeyfio v Tagoe*, the court referred a question of customary law to the Ga State Council.[21] The court ascertained from the council the right of children to inherit their deceased father's estate in the absence of any parent or sibling of his.[22] As customary law was a question of fact, the court had the liberty to accept or reject the evidence of the witnesses.[23] For example, in the case of *Angu v Attah*, the evidence of the expert witness was accepted by the court because he gave strong evidence that by customary law, the appellant was entitled to tribute out of the lands of Bortogyina.[24] The court gave its interpretation and conclusion based on this evidence, which later became judicial customary law entrenched by the weight of precedent.[25]

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[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.*
[21] *Sackeyfio v Tagoe* (1945) 11 W.A.C. A 73; see also David A. Nii- Amponsah, "The Rule in Angu v Attah Revisited" (1987-1988) 16 Rev Ghana L 281 & *Anna Ahiafor v Warren G. Akwei* (1944), Warren Akwei was a son of the deceased and claimed that by Ewe customary law he was entitled to solely inherit his mother and not his grandmother, Anna Ahiafor, who was the mother of the deceased. The Divisional Court referred the question to two State Councils in the patrilineal system for their separate opinion on the customary law. These traditional authorities were the Ga State Council and the Anlo State Council. The reports of the two traditional bodies agreed in the opinion that the mother of the deceased took precedence over the child in succession to the deceased.
[22] *Ibid.*
[23] Nwauche, *supra* note 2 at 43.
[24] *Angu v Attah*, *supra* note 7.
[25] Diala, "Critique of Judicial Attitude" *supra* note 13 at 108.

Customary law in Ghana was treated as foreign law in its own land. The proof of customary law touched the delicate nerve of emergent national pride, since requiring proof by witnesses indicated that customary law was "not real law but merely an operative fact."[26] For instance, Dr. Kwame Nkrumah, the first President of Ghana, suggested a reversal of what he depicted as the "travesty of the local custom," which had been made exotic in its own land of origin.[27] According to him,

> African law in Africa was declared foreign law for the convenience of colonial administration, which found the administration of justice cumbersome by reason of the vast variations in local and tribal customs. As a result, African law had to be proved by experts. But no law can be foreign in its own land and country, and African lawyers, particularly in the independent African states, must quickly find a way to reverse this judicial travesty.[28]

Scholars have also interrogated the reliability of the information from these chiefs and elders.[29] First, customary laws are flexible and negotiable rules. However, upon its interpretation in court, chiefs and elders are made to translate these flexible principles into hard rules.[30] This leads to these experts' inventing rules, giving inaccurate information or subjective interpretations.[31] The constant changes in the content of customary laws aggravate the problem. Even if the evidence available to a court provides precise information about the content of customary laws as they were on a particular date, it is always possible that they have since changed. This renders unsafe the reliance on judicial customary law, "law in the books," for deciding on customary law and further reduces the need for codification of customary laws.[32]

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[26] William B Harvey, *A Value Analysis of Ghanaian Legal Development Since Independence* (Indiana: Bloomington, Indiana University,1964).
[27] Korang, *supra* note 6 at 93.
[28] *Ibid* at 93.
[29] Thierry Verhelst, *Safeguarding African Customary Law: Judicial and Legislative Processes for its Adaptation and Integration* (California: UCLA international Institute,1970) 42.
[30] *Ibid* at 39.
[31] *Ibid* at 39.
[32] *Ibid at 42.*

Secondly, these chiefs and elders called to give evidence were men. As such, they presented customary law in such a way as to support their group and personal interests. Therefore the information presented to the court in most cases favoured the men to the detriment of women.[33] This practice enforced patriarchy within the Ghanaian legal system, as women did not have a voice to give their version of what customary law was. Were there no women who were also knowledgeable of existing customary laws? The Queen Mothers of the Akan ethnic group are good examples of repositories of Akan customary law. A Queen Mother of the Akan ethnic group is responsible for settling disputes in her jurisdiction including domestic issues between men and women and other non-domestic matters.[34]

Like the Akan chiefs, Queen Mothers also addressed cases involving problems of a public or property nature.[35] The Queen Mother paid close attention to the presentation of the problem and provided a solution. Like the chiefs, the paramount queen mother (Asantehemaa) had elders who aided her in addressing issues.[36] In the same vein, Ga Queen Mothers were known for settling disputes. The Ga Queen Mothers settled disputes ranging from marital conflicts to inter-family disputes. Like the Akans, Queen Mothers in the Ga traditional area carried out essential functions.[37] They were repositories of wisdom, traditional knowledge, and customary law.[38] As such, people referred complex issues to them for counselling. Thus, the notion of "ayabiyoomo," meaning, "let us seek counselling from the old lady," emerged and still lingers on.[39] Despite their

[33] *Ibid* at 42.
[34]Beverly J Stoeltje, "Asante Queen Mothers: A Study in Female Authority" (1997) 810:1 Annals of the New York Academy of Sciences 41-71.
[35] *Ibid* at 56.
[36] *Ibid* at 58.
[37] Rufai Kilu Haruna, "Engendering Peace Building in Ghana: The Role of Queen Mothers in Traditional Conflict Resolution in Ga Traditional Areas" (2015) 4:1 International Journal of Innovative Research & Studies 127.
[38] *Ibid* at 127.
[39] *Ibid* at127.

knowledge of customary law, Queen Mothers were not called upon to give evidence in court.[40] These older women could have given their versions of customary law that addressed the concerns of women. However, Queen Mothers were given relatively negligible attention, while chiefs and male elders were given great recognition by colonial courts.[41] According to Middleton and Miller, "sexism was an ideal that was apparent and encouraged in colonial Africa."[42] The practice where men could present customary law in the court reinforced the inequality women face in claiming their inheritance rights. This is because the customary law of succession presented did not reflect the interest and concerns of women.

Thirdly, relying on this evidence gave an incomplete picture of customary law, as judges neglected the foundational values or underlying principles that inform customs. A social norm has both an "internal'' and "external aspect."[43] The external aspect is the aspect of customary law that is easily observable. While not easily observable, the internal part refers to conscious attitudes toward acceptable behaviour, which examine human conduct to determine whether a sense of obligation is involved.[44] It is "a critical reflective attitude to specific patterns of behavior as a common standard."[45] This sense of obligation gives custom the legal character it requires for judicial recognition. An obligation is not incurred in human actions "simply because a repetitive pattern can be discerned. Customary law arises out of repetitive actions when and only when such actions are motivated by a sense of obligation."[46] Thus, where threatened deviations meet with pressure

[40] *Ibid* at 128.
[41] *Ibid* at 128.
[42] John Middleton & Joseph C Miller, *"Gender", New Encyclopedia of Africa,* Vol 2 (Detroit: Charles Scribner's Sons,2008) 443-446.
[43] Anthony C Diala, "The Concept of Living Customary Law: A Critique" (2017) 49:2 J Leg Pluralism & Unofficial L 143.
[44] *Ibid* at 143.
[45] *Ibid* at 144.
[46] *Ibid* at 144.

for conformity and actual deviations are seen as violations of acceptable conduct, the custom in question should be regarded as law. That is, "it is the existence of this critical reflective attitude that distinguishes custom simpliciter from customary law."[47]

In the above sense, the internal aspects of customs serve as guides to the conduct of social life. This internal aspect is flexible, as it is dependent on contemporary social ideas of acceptable conduct.[48] If judges apply only the external aspects of customs, the result is likely to be a judicial customary law which neglects the foundational values that inform customs.[49] The internal part contains these foundational values or underlying principles that explain the manners in which members of a social group view their normative behaviour.[50] The social group's critical reflective attitude toward their rules enables them to determine when a custom has outlived its usefulness or when it needs to be modified to suit socio-economic changes. When judges apply only the external part of customary law, they might miss the foundational values that underpin people's adaptation of customs to socio-economic changes, thereby denying women their inheritance and property rights.[51] There is a need for the court to focus on the underlying principles that prompt, inform and guide people's adaptation of customs to meet their social needs.[52] If the court focuses on these underlying values, this will bridge the gap between judicial customary law and the customary law practised by the people. Then, the judiciary will interpret customary law based on an accurate representation of the customary law practised by the people.[53]

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[47] *Ibid* at 144.
[48] Diala, "A Critique of the Judicial Attitude", *supra* note 13 at 108.
[49] *Ibid* at 108.
[50] *Ibid* at 108.
[51] *Ibid* at 108.
[52] Ama Hammond, "Reforming the Law of Intestate Succession in a Legally Plural Ghana" (2019) 51:1 J Leg Pluralism &Unofficial L 1174-139.
[53] Gordon R Woodman, "Survey of Customary Laws in Africa*",* in Jean Marie et al, eds*, The Future of African Customary law* (Cambridge: Cambridge University Press,2011) 22.

The question then is, what are these foundational values? Legal scholars, including Diala and Ndulo, have highlighted some of these underlying principles of customary law.[54] These values include family continuity, the duty of care owed to family members by the family head, the non-individual nature of marriage, and the preservation of the ancestral home.[55] Scholars argue that customary law's underlying principles of humanness and duty of care to the family can be extended into legislation recognizing not only women's matrimonial property rights but also their spousal right to maintenance or reimbursement after the demise of their husbands.[56] A significant challenge of the court has been how to identify and ascertain these foundational values embedded in customary law.[57] The reason behind this challenge of the court is that the legal training of lawyers in Ghana, as in most common law systems, is more oriented toward the English legal tradition.[58] Therefore, judges and lawyers are trained within the theoretical frameworks of legal positivism which does not effectively prepare them to handle the implementation of non-Western normative orders such as living customary law, in which customary law and its underlying principles are perceived differently.[59] The consequence is that lawyers and judges perceive living customary law as imaginary and non-existent or even consider living customary law as an informal law that is not important to state institutions.[60] Also, judges' upbringing does not give them a thorough,

[54] Diala, "The Concept of Living Customary Law", *supra* note 43 at 143; see also Muna Ndulo, "African Customary Law, Customs and Women's Rights" (2011) 18:1 Ind Journal Global Leg Stud 114.
[55] Likhapha Mbatha, "'Reforming the Customary Law of Succession" (2002) 18 South Afri J Hum Rts 259-286, see also Alfred R Radcliffe-Brown &D. Forde, *African Systems of Kinship and Marriage* (London: Routledge Press,2015) 1.
Diala, "A Critique of the Judicial Attitude", *supra* note 13 at 108.
[57] Chuma Himonga, "The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Refence to South Africa" in Jean Marie Fenrich et al, eds, in *The Future of African Customary Law* (London: Cambridge University Press,2016).
[58] Chuma Himonga & Fatima Diallo, "Decolonisation and Teaching Law in Africa with Special Reference to Living Customary Law" (2017) 20:1 Potchefstroom Electronic Law Journal 11.
[59] *Ibid* at 11.
[60] *Ibid* at 11.

reliable knowledge and comprehension of the totality of their customary law of birth. Moreover, in a multi-ethnic state like Ghana, it is possible that the judge will be a stranger to certain customary laws.[61] Recognition of the problems in this procedure has been one of the reasons why the African continent seeks authoritative, written statements of customary law in the form of codes, restatements, or other commentaries.[62] However, it is not evident that any such statement can be sufficiently comprehensive and extensive to answer the many questions that could arise in one of the various and numerous customary laws in African countries, including Ghana.[63]

3.3 The doctrine of judicial precedents in Post-colonial Ghana

Currently, judges continue to rely on these judicial precedents to interpret and apply customary law. As a result, judges have failed to interpret customary law outside the homogenizing tendencies of the common law and its principles of judicial precedent and judicial notice.[64] For example, in *Adom and Another v Kwarley,* Robert Owusu Adom, the deceased, was a mason. He built a matrimonial home with the support of his wife, Dodua, at Kaneshie in Accra. Upon his death, the family of the deceased and the widow contested the ownership of the house. The court held that a wife who helps her husband in his business does not become a joint owner of the husband's earnings or any property he acquires with his income.[65] In this case, the wife had helped her late husband build a house by selling the produce of their vegetable farm to help raise enough funds. According to customary law, the court saw her active effort in her husband's business as part of her domestic responsibility.[66]

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[61] *Ibid* at 11.
[62] *Ibid* at 12.
[63] *Ibid* at 12.
[64]Nwauche, *supra* note 2 at 61.
[65] *Adom & Another v Kwarley* (1962) 1 GLR 112.
[66] *Ibid.*

Similarly, in *Gyamaah v Buor*, a widow demanded a specific share of eleven cocoa farms which she claimed to have helped her husband cultivate when he was alive.[67] The trial court upheld the widow's claim. However, the appeal court overturned the verdict of the trial court based on the customary law rule that the wife had a customary obligation to help her husband in his everyday activities and the acquisition of property. However, these efforts of the wife, did not guarantee her to be a co-owner of such property acquired through her assistance.[68]

These two judgments were based on the judicial precedent in *Quartey v Martey*. In this case, H.A. Martey and Evelyn Quartey were farmers married under customary law for 25 years before Martey died.[69] The land on which they farmed was possessed by Martey, who had inherited it upon the death of his father. The estate included 70 cattle and a cash amount of 1305 pounds. Evelyn Quartey helped Martey during his lifetime and actively supported him in all his work.[70]

She claimed a fair share of the properties after her husband's death. However, the extended family of the deceased insisted that Evelyn Quartey had no share in the deceased's property.[71] The court ruled that the widow did not have a right to a share of the estate of the deceased because:

> By customary law, it is the domestic responsibility of a man's wife and children to assist him in carrying out of the duties of his station in life such as farming or business. The proceeds of this joint effort of a man and his wife and/or children and any property which the man acquires with such proceeds are by customary law the individual property of the man. It is not the joint property of the man and his wife and/or the children. The right of the wife and the children is a right to maintenance and support from the husband and father.[72]

[67] *Gyamaah v Buor* (1962) 1 GLR 196.
[68] *Ibid.*
[69] *Quartey v Martey & Another,* (1959) GLR 377.
[70] *Ibid*.
[71] *Ibid*.
[72] *Ibid.*

This right to maintenance and support becomes the responsibility of the family of her deceased husband. Even though the court mentioned the widow's right to maintenance, the court failed to charge the extended family with the responsibility of maintaining the wife according to customary law. These judicial precedents contain old inheritance practices that creates unjust inheritance practices due to the remarkable socio-economic changes.[73] Judges have also not provided women with the right maintenance due to these judicial precedents. The court must change the situation where widows do not receive equal shares of intestate property under customary law, as it affects women's inheritance rights. Some changes have been missing from judge-made customary law: women's current monetary and non-monetary contribution towards the acquisition and maintenance of matrimonial property and the increased isolation of the nuclear family from the extended family.[74] Modern urban families are no longer structured and organized along purely traditional lines. Due to urbanization and families looking for greener pastures, most modern families are now nuclear and have moved from rural to urban areas. As a result, nuclear families live an isolated lifestyle where they have less contact with their extended families. The old inheritance practice where the customary successor is given the whole estate and is supposed to maintain the wife and children of the deceased will therefore not work effectively, as the widow and children do not reside with the extended family.

Judges do not consider these new developments. As such, Goodsell describes judicial customary law as an embodiment of "institutionalized gender inequality."[75] Indeed, that customary law now

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[74] Nelson Tebbe, "Inheritance and Disinheritance: African Customary Law and Constitutional Rights" (2008) 88:4 Journal of Religion 466-496.
[75]Erin Goodsell, "Constitution, Custom, and Creed: Balancing Human Rights Concerns with Cultural and Religious Freedom in Today's South Africa" (2007) BYU J Pub L 21 109.

discriminates against women is a result of the static nature of judicial customary law and changing circumstances that make the law ineffectual.[76] Therefore, it is imperative that the court move beyond the static nature of customary law and consider the adaptable nature of customary law. Judges must be more generous and thorough in their interpretation of customary law in such a way that dovetails with the imperatives of life and be attentive to the realities in society.[77] For the Ghanaian courts to address the discrimination women face, they must depart from past practices and focus on new developments and rules in response to the changing socio-economic conditions.[78] This entails declaring discriminatory customary norms of succession unconstitutional, invalid, and inapplicable in modern Ghanaian society.[79] Thus, Ghanaian courts should exhibit more flexibility and preparedness to overrule judicial customary laws that discriminate against women.[80]

In several other African jurisdictions, courts have acknowledged the need for change and have shown an understanding of the current socio-economic changes. I will take two prominent cases from Nigeria and one from Kenya, where the court has nullified certain discriminatory customary norms of succession. The first of these cases is *Mojekwu v Mojekwu.* According to customary law under the Nnewi custom, when a man dies leaving behind a male child, the male child inherits the deceased's estate.[81] When the deceased leaves no male offspring behind, his brother will inherit his property. If the male child who survives the deceased dies, leaving no male child, the father's brother inherits his estate, and on it goes along the male line only.[82] In this case, the son of the

[76] *Ibid* at 112.
[77] *Ibid* at 112.
[78] Ndulo, *supra* note 54 at 102.
[79] *Ibid* at 102.
[80] *Ibid* at 102.
[81] *Mojekwu v Mojekwu* (1997) 7 NWLR 283.
[82] *Ibid.*

deceased's late brother inherited the estate to the exclusion of the daughter of the deceased. The Nigeria Court of Appeal found the Igbo (part of southern Nigeria) custom prohibiting female family members from inheriting property unconstitutional.[83] The court stated that all human beings "are born into a free world and are expected to participate freely, without any discrimination on the grounds of sex."[84] Justice Tobi further stated that,

> Any form of societal inhibition on the grounds of sex apart from being unconstitutional, is an antithesis to a society built on the tenets of democracy which we have freely chosen as a people. We need not travel all the way to Beijing to know that some of our customs, including the Nnewi Oli-Ekpe custom relied upon by the appellant, are not consistent with our civilized world in which we all live today, including the appellant. In my humble view, it is the monopoly of God to determine the sex of a baby and not the parent. I believe that God, the creator of human beings, is also the final authority of who should be male or female.[85]

Justice Tobi assertion that the "Nnewi Oli-Ekpe custom is not consistent with the civilized world". This indicates that the judge considers that judicial customary laws to be static and in need of change to reflect contemporary socio-economic realities.

Another ground-breaking case in Nigeria where the Supreme Court advanced women's property rights is the case of *Ukeje v Ukeje.* In this case, the Nigerian Supreme Court, in a unanimous decision, declared that the Igbo customary law of inheritance, which prohibits female children from inheriting the property of their deceased fathers, was contrary to the principles of non-discrimination in the 1999 Constitution of Nigeria and, therefore invalid.[86] In December 1961, Lazarus Ogbonnaya Ukeje died without a will, leaving real property in Lagos State. The defendants were his wife, Mrs. Lois Chituru, and her son, Mr. Enyinnaya Lazarus Ukeje. They had received letters of administration. Letters of administration are documents issued by a court

[83] *Ibid.* The court stated that the Nnewi custom was inconsistent with Section 14 ,1999 Constitution of Nigeria.
[84] *Ibid.*
[85] *Ibid.*
[86] *Ukeje v Ukeje* (2014) 11 NWLR 384. In addition to the two cases cited, there are other cases including *Anekwe Nweke* (2014) 9 NWLR (PT 1412) which have shaped women's' property rights in Nigeria.

supporting the administration of estates for the deceased's properties.[87] The plaintiff was the daughter of the deceased. She filed this suit seeking a declaration from the court that as the female child of the deceased, she had a right to a share of her father's properties. [88] The trial judge stated that the letters of administration were invalid and declared an injunction preventing the defendants from administering the estates. Therefore, the court issued a new letter of administration that permitted the daughter of the deceased to administer his estate.[89]

The defendants' appeal to the Court of Appeal (Lagos Division) was dismissed for having no merit. Therefore, the case was brought before the Supreme Court of Nigeria by the defendants on appeal against the Court of Appeal's judgment.[90] All parties involved in this case were of the Igbo nation. The Supreme Court upheld the judgment of the lower courts that the Igbo custom which prevents females from inheriting their deceased parent's estate is unconstitutional and contrary to the fundamental right to freedom from discrimination stipulated in Sections 42(1a) and (2) of the 1999 Constitution.[91] The Supreme Court also made a textual interpretation of the Constitution. The Supreme Court further stated that regardless of the circumstances of the birth of female offspring, such a child has the right to a fair share of her deceased father's estate. This includes female offspring born out of wedlock.[92] The Supreme Court dismissed the appeal and upheld the trial court's decision. The Court overruled the Igbo customary law, which prevented women from inheriting their deceased father's estate.[93] Although not explicitly stated by the court, this case brought up issues of multiple or intersectional discrimination, where discrimination is not based

[87] *Ibid.*
[88] *Ibid.*
[89] *Ibid.*
[90] *Ibid.*
[91] 1999 Constitution of Nigeria, s 42(1a) (2).
[92] *Ukeje v Ukeje* (2014) 11 NWLR 384.
[93] *Ibid.*

only on sex but can intersect with other factors such as circumstances of birth (being born out of wedlock).[94] *Ukeje v Ukeje* was a victory for women's right to property in Igbo society and Nigeria as a whole.[95]

In Re the *Estate of Andrew Manunzyu Musyoka*, a prominent Kenyan case, the deceased died intestate.[96] The daughter of the deceased born of his first customary law marriage brought an application before the court. The daughter filed a suit to challenge the filing of the letters of appeal by the deceased's sons and wife, claiming that they were the sole beneficiaries of the estate of the deceased. The daughter also claimed that she had an equal share in the estate of the deceased.[97] However, according to the customary law of the Kamba people, a female married under customary law cannot inherit the properties of her deceased father. Furthermore, the daughter can only inherit her deceased father's estate only if she is divorced, and the mbui sya ulee (goats) are returned by the daughter to the husband.[98] The court found that the daughter of the deceased was married and was ineligible to inherit her father's properties according to the Kamba customary law.

However, the court ordered that her name should be added to the filing of the letters of administration.[99]

The court held that Kamba's customary law was discriminatory since it denied her inheritance rights on the grounds of sex. The court made its decision based on the *Succession Act*, which generally regulates intestate succession.[100] Section 3(2) of the *Succession Act* states that "if a party to a matter is subject to or affected by African customary law, the courts are to apply customary

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[94] *Ibid.*
[95] *Ibid.*
[96] Estate of Andrew Manunzyu Musyoka (2005) EKLR (HC).
[97] *Ibid.*
[98] *Ibid.*
[99] *Ibid.*
[100] *Ibid.*

law as long as they are not inconsistent with any written law and shall decide all such cases according to substantial justice."[101] Therefore, the court found that because the Kamba customary law under consideration excluded a married daughter from inheriting her deceased father's properties, the Kamba customary law discriminated based on sex and was contrary to Section 40(1) of the *Succession Act*, which has a gender-neutral provision for intestate succession in the case of polygamous marriages.[102] Regarding Section 40(1), the court decided on the applicant's eligibility to inherit, declaring that unless she decided not to accept the estates of the deceased, she was entitled to inherit.[103]

Moving to the Constitution, the court stated that the Kamba customary law was inconsistent with section 82(1), the non-discrimination provision in the Constitution.[104] The court further stated that Kenya, as a signatory to several international conventions and regional instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the African Charter of Human Rights and Peoples' Rights had a duty to enforce the doctrines of anti-discrimination contained therein.[105] The court stressed this point by noting that "international law is applicable in Kenya as part of our law so long as it is not in conflict with the existing law even without specific legislation adopting it."[106] The court referred to the precedent *Mary Rono v Jane Rono and William Rono* in which judges relied on international conventions to

[101] Kenyan Law of Succession Act (2012), s 3(2).
[102] *Ibid* at s 40(1).
[103] *Ibid* at s 40(1).
[104] 2010 Constitution of Kenya, s 82(1). Section 82(1) states that "No law shall make any provision that is discriminatory either in itself or its effect".
[105] Estate of Andrew Manunzyu (2005) EKLR (HC).
[106] *Ibid.*

overrule a discriminatory succession norm.[107] The court thus approved the use of international conventions in cases of domestic customary law discrimination.[108]

These three cases show the reformist approach adopted by the courts in other jurisdictions. They have declared certain customary laws of succession unconstitutional. For years, the decisions of many African courts had a static opinion of customary law and did not try to alleviate the operation of discriminatory customary laws of succession that discriminated against women.[109] This is gradually changing. Judges are understanding that judiciary customary law is static and contains old inheritance practices that discriminate against women. Due to post-democratization constitutions, other African courts have taken up the challenge.[110] Cases such as *Ukeje v Ukeje* also demonstrate the need for the court to adopt an intersectional approach.[111] The use of intersectional approach is worthy of imitation in the Ghanaian courts. Intersectionality helps the court identify how multiple factors of discrimination intersect by evaluating how their interaction produces a heightened risk of the vulnerability of women. Intersectionality could have been adopted in the case of *Gyamaah v Buor*, *Adom and Another v Kwarley*.[112] The court should have considered other intersecting factors, including poverty and illiteracy, to provide the right remedies for the surviving widows. For example, the facts in *Quartey v Martey* shows that Evelyn Quartey was a farmer.[113] The court should have considered other factors including her literacy level and financial status, which could have intersected with her gender to contribute to the discrimination she faced.

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[107] *Mary Rono v Jane Rono & William Rono* (2002) JELR 99232 (CA).
[108] *Ibid.*
[109] Ndulo, *supra* note 54 at 113.
[110] *Ibid* at 113.
[111] *Ukeje v Ukeje* (2014) 11 NWLR 384.
[112] *Gyamaah v Buor* (1962) 1GLR 196; see also *Adom and Another v Kwarley* (1962) 1 GLR 112.
[113] *Quartey v Martey* (1959) GLR 377.

Notwithstanding, in *Akrofi v Akrofi,* the Ghanaian courts endeavoured to move away from the stereotype exhibited in their interpretation of customary law.[114] In this case, the plaintiff was the only child of the deceased and sought an order from the court stating that she was the sole successor to her deceased father's estate. This action arose because the deceased's brother had been appointed heir to the deceased's estate. Succession to property in Buem in the Volta Region of Ghana is patrilineal, and male children take preference over female children. However, in the absence of any male children, female children are not prevented from inheriting and are, in the language of the court, "within the range of persons entitled to succeed."[115] The plaintiff, the only child of the deceased, was therefore granted a share of the deceased's estate.

Similarly, in *Quaicoe v Fosu*, the head of family stated that according to the matrilineal customary law of succession, the children of the deceased were not entitled to the deceased's properties as they did not belong to their father's family. Therefore, the head of the family argued that the extended family was entitled to the estate. [116] Justice Archer was determined to give his judgment in what he called "the true spirit of the Ghana Constitution".[117] Justice Archer subjected the customary law to "judicial malleability".[118] He stated that:

> Without committing any heresy, I am prepared to take the plunge and to assert that the proposition that children are not considered members of the father's family is contrary to all biological principles, alien to well-known doctrines of all accredited religions and opposed to common sense. The logic of the customary rule is that because children are not considered members of the father's family, therefore they are completely excluded from

[114] *Akrofi v Akrofi* (1965) GLR 13 ,14.
[115] *Ibid* at 16.
[116] *Quaicoe v Fosu (1965*) GLR 145.
[117] *Ibid*.
[118] *Ibid*.

> any share of or right to his property. As I have already argued if the basis for this exclusion does not make sense, then the exclusion itself cannot stand.[119]

The courts should exhibit a more progressive orientation and engineer a change in their interpretation of customary law. There is a need for the Ghanaian court to give more judgments, like that of *Akrofi v Akrofi* and *Quaicoe v Fosu.*[120]

The courts in Ghana are uncertain when a rule of customary law should be applied in its present state and when it should be modernized to reflect the socio-economic changes in recent times.[121] This uncertainty is due to the conflicting opinions within the community of judges as to whether it is the role of the court to modernize and apply a customary law or whether a rule of customary law should be applied as found.[122] According to Mensa Bonsu, this can be attributed to two different schools of thought among judges: the conservative school and the modern school. Judges belonging to the modern school believe that judges should modernize customary law to suit current times.[123] Judges of the modern school believe that what remains after modernization is not customary law but leads to the creation of judicial customary law. Wiredu J, a proponent of this school, states that:

> There is no doubt that to adopt and modernize rules of customary law to meet changing conditions is a worthwhile venture. It is the objective of every progressive society to alter and modify its social and legal institutions and rules to meet the needs of the time. But a customary rule that is given a new facet by the injection of modern ideas and principles ceases to be what was original. Moreover, when the courts apply and give effect to such a rule, they are not enforcing customary law in the sense that is known hitherto. On the contrary, the judge is creating new rules whose authority belongs to case law and not customary law.[124]

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[119] *Ibid*.
[120] *Ibid*, *see also Abebrese v Kaah* (1976) 2 GLR 46.
[121] HJAN Mensa-Bonsu, "Of Nuts in the Ground Not Being Groundnuts: The Current State of Customary Law in Ghana" (2002-2004) 22 U Ghana LJ 1.
[122] *Ibid* at 15.
[123] *Ibid* at 15.
[124] *Ibid* at 15.

On the contrary, the conservative school believes in maintaining the status quo, as the responsibility for changing the rules belongs to the community who made the laws. They believe that judges' only means of assisting the process of change is by suggesting reform to the legislature.[125] The legislature as representatives of the people can change existing customary laws. I argue that the authority of the judiciary to modernize and develop customary law is evidently not well settled. This uncertainty created by the attitude of the courts is bad for the more serious enterprise of modernizing customary law to address the inequalities women face in accessing their inheritance rights.[126]

Additionally, Ghanaians are shaped and socialized by traditional values. Even the educated elites, including judges and legislators, continue to adhere to the traditional system of inheritance and display their devotion to age-old principles of customary law, which by virtue of their socialization appeals to their sense of justice.[127] This is evident in the submission of Cletus Avoka, a legislator, who stated that Ghanaians should preserve their customary laws to help build a more cohesive society. He stated further that the incorporation of international human rights values would be a "radical intrusion into our customary system."[128] According to him, Ghanaians are envied because of what their traditional values have moulded them into. As such, the international understanding of human rights which is foreign to the Ghanaian culture will lead to a collapse of the traditional or cultural values of the society.[129] Ghanaians extol the virtues of customary law and believe that the values of customary law account for the solidarity within families and among the people of

[125] *Ibid* at 15.
[126] *Ibid* at 15.
[127] Ama Hammond, *Towards an Inclusive Vision of Law Reform and Legal Pluralism in Ghana* (PhD Dissertation, University of British Colombia,2016) 173.
[128] Ghana Official Report of Debates of Parliament (4th session of the 5th Parliament of 4th Republic Fourth Series Vol.76, No.2) at para 90-91.
[129]Hammond, "Towards an Inclusive Vision of Law", *supra* note 127 at 172.

Ghana.[130] Additionally, Joseph Chireh, a former legislator, exhibited his devotion to traditional values and expressed a very traditional opinion of the method for the determination of legal entitlements of surviving spouses. Elucidating his view on how the courts must distribute intestate property among surviving spouses, he stated that "the entitlement to any share of the estate of the person must be dependent on your contribution to the estate and not just that you are a wife. If it is so, it does not make sense."[131]

Like other Ghanaians, judges are shaped and socialized by traditional values. Judges are members of extended families and customary heirs who can inherit intestate property. Will they alter existing judicial customary laws and forfeit their inheritance as customary successors? Legal education will have a hard time changing the status quo and the mindset of judges who have been socialized and shaped by traditional values. Some Ghanaians are not willing to surrender their legal heritage or their customary laws.[132] International human rights are foreign concepts to judges and lawmakers.

3.4 Supplementing the work of the judiciary in the development of judicial customary law.

An unresolved issue is how to complement the work of the judiciary and promote the project of reforming Ghanaian customary law so that the laws that discriminate against women can be eliminated.[133] The task of customary law reform is too huge to be left to the judiciary alone. The judiciary is limited in that they can only handle issues that arise in cases brought before them.[134] It is therefore imperative that other stakeholders are part of this reform process. The government and the chiefs are very important agents who can complement the work of the courts. The

[130] *Ibid* at 172.
[131] *Ibid* at 172.
[132] Anne Hellum, "Women's Human Rights and Customary Laws: Between Universalism and Relativism" (1998) 10:2 Eur J Law Dev 88.
[133] *Ibid* at 89.
[134] *Ibid* at 89.

government and traditional rulers can assist the judiciary in developing customary law to suit contemporary socio-economic changes.

(I)The role of traditional rulers

The court must determine the true content of customary law as practised in the communities.[135] The changing nature of customary law and the fact that it is unwritten have led to the challenge of its ascertainment. Thus, there is not enough evidence and materials to enable the court to apply a living customary law that reflects contemporary socio-economic changes.[136]

An essential provision that is worth the deepest consideration in the effort to simplify, if not solve the problems concerning the ascertainment of living customary law, is Section 55(5) of the Court Act 1993. Section 55(5) stipulates that "the court may require the House of Chiefs, Divisional or Traditional Council or other body with knowledge of the customary law in question to state its opinion that may be laid before the inquiry in written form."[137]This provision seeks to reserve the question of the establishment of customary laws for the various Houses of Chiefs and Divisional or Traditional Councils of those customs.[138] The National House of Chiefs is an officially recognized body in Ghana that brings together all the traditional rulers, chiefs, and kings. The National House of Chiefs consists of five Paramount Chiefs from each region elected by the Regional Houses of Chiefs. The total membership of the house is fifty paramount chiefs. The House of Chiefs performs research, judicial, administrative, financial, and advisory functions.

[135] Chuma Himonga, "Future of Living Customary in African Legal Systems in the Twenty-First Century and Beyond with Special Reference to South Africa" in Jean-Marie Fenrich et al, eds, *The Future of African Customary Law* (Cambridge: Cambridge University Press,2011)50.
[136] *Ibid* at 48.
[137] 1993 Court Act of Ghana, s 55(5).
[138] *Ibid* at s 55(5).

Therefore, inquiring with the House of Chiefs is, of course, a more suitable and effective way of ensuring the existence and accuracy of the various customs from the very traditional root of those who are the custodians of customary law.[139]The current leadership of the House of Chiefs should carry out in-depth research into living customary laws. The research on the living customary laws in the various communities can provide accurate information that can be used by the courts. Agreeing with Kludze, "the customary law on the devolution of intestate estates is certain and ascertainable in the several communities."[140] As a matter of fact, what is not certain is judicial customary law.[141] To ascertain living customary law, the House of Chiefs should constantly observe the customary laws in the communities to know the rules they continue to follow and those that have been discarded.

Additionally, the House of Chiefs also has the constitutional mandate in Article 272(c) to "undertake an evaluation of the traditional customs and usages with the view to eliminating those customs and usages that are outmoded."[142] The Houses are also required to undertake "a progressive study, interpretation, and codification of customary law with a view to evolving in appropriate cases, a unified system of rules of customary rules and compiling the customary laws and lines of succession applicable to each "stool or skin"[143] In Ghana, stools are the distinguished symbols of political, judicial and social leadership-"the most important of the chief's regalia and the *sine qua non* of his high office." When a person is selected as chief, he is enstooled in the office – meaning he sits upon the stool."[144]

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[139] Joseph B Akamba & Isidore Kwadwo Tufuor, "The Future of Customary Law in Ghana" in Jean Marie Fenrich et al, eds, *The Future of Living Customary Law* (Cambridge: Cambridge University Press,2011) 208.
[140] AKP Kludze, "Problems of Intestate Succession in Ghana" (1972) 9UGLJ 89 at 101.
[141] *Ibid* at 101.
[142]1992 Constitution of Ghana, art 272(c).
[143] *Ibid* at art 272(b); see also 1993 Court Act of Ghana, art 274(3)(F).
[144] Sharon F Patton, "The Stool and Asante Chieftaincy" (1979) 13:1 African Arts 74.

Most chiefs in the southern part of Ghana sit upon a stool. However, in the northern part of Ghana, a chief selected is clothed in a white smock, a red cap, and "enskinned"-meaning he sits on a skin. These skins are usually taken from animals that are sacrificed to ancestral spirits.[145] In both northern and southern Ghana, chieftaincy is inherited and therefore has customary rules regulating chieftaincy processes.[146] Therefore, the National House of Chiefs has a constitutional mandate to compile the customary laws of succession of the various ethnic groups, including the customary rules applicable to chieftaincy. Additionally, the new Chieftaincy Act 759 of 2008 also requires the National House of Chiefs to promote the development of the customary law by "undertaking the progressive study, interpretation, and codification of customary law to evolve a unified system of rules of customary law where appropriate."[147]

The court can rely on the House of Chiefs and Traditional Councils to ascertain a living customary law. The membership of the House of Chiefs and traditional councils should include women specifically queen mothers who are knowledgeable of customary laws. Queen mothers like chiefs should be elected by the regional house of chiefs to be part of the membership of the National House of Chiefs. Ghana can learn some lessons from Kenya. In the Turkana region in Kenya, some women have gained credibility to serve on the local council, where their contribution to decision-making has promoted women's rights.[148]

The opinions of these queen mothers on customary laws will reflect the concerns of women.

[145] Alhassan Anamzoya, "Chieftaincy Conflicts in Northern Ghana: The Case of the Bimbilla Skin Succession Dispute" (2010) 3 Journal of Intra-African Studies 50.
[146] *Ibid* at 52.
[147] Chieftaincy Act 759(2008), s 49.
[148] *Ibid* at 41.

The court can ascertain customary law by making an inquiry to these bodies in question to state their opinion on a particular customary law.[149] The court can also ascertain the underlying values of customary law from chiefs. The courts should deconstruct and see what foundational values underpin customary laws.[150] For example, the court should question the core values of the custom of widow inheritance, where the widow is "inherited" by a male successor of the late husband's lineage. Is it about marrying the widow and having a sexual relationship with her or caring for the widow and her children? If the latter is the case, the deceased successor can achieve this without the widow marrying him.[151] Getting to the heart of these values is a difficult task, but with the help of the chiefs and further research, the courts can ascertain these underlying values.[152] Diala advocates for a "holistic approach," that is, combining the internal aspects (underlying values) and external aspects of customary law.[153] Including these foundational values in a new legal system devoid of discrimination is an excellent way to ensure stability, fairness, predictability, and equality. [154]

Since independence, chiefs in Ghana have played a significant role in the development of customary law, which continues to be an essential element in the lives of most of the Ghanaian populace.[155] However, one major problem has been the series of chieftaincy disputes in the traditional societies in Ghana today.[156] The diverse Houses of Chiefs are engaged in prolonged chieftaincy disputes leading to the relegation of the proper responsibilities given to them by the

[149] Ndulo, *supra* note 54 at 118.
[150] *Ibid* at 118.
[151] *Ibid* at 118.
[152] *Ibid* at 118.
[153] Diala, "Critique of Judicial Attitude" *supra* note 13.
[154] Ndulo, *supra* note 54 at 118.
[155] Akamba &Tufuor, *supra* note 139 at 223.
[156] *Ibid* at 223.

1992 Constitution and Section 49 of the Chieftaincy Act 2008.[157] Therefore, quickly handling such an issue to reduce its effect is important to the success of the development of customary law.

(II) The role of the state

Another important stakeholder is the state. The government of Ghana should develop initiatives that will promote empirical inquiries on living customary law.[158] These initiatives include establishing a Customary Law Centre, which will provide guidance on customary law matters and serve as a repository for all customary law research and reference materials.[159] A similar initiative has been carried out in South Sudan through the National Customary Law Centre in Rumbek, Lake State, which is one of a kind in Africa.[160] Under the Ministry of Legal Affairs and Constitutional Development, the Customary Law Centre provides training and advice on all matters concerning customary law.[161] The Centre is beneficial to the development of customary law in South Sudan. The court refers questions of customary law to such an institution. In addition, the Customary Law Centre has facilitated coordination between the government and other stakeholders of the customary justice system. In collaboration with the Local Government Board, the Customary Law Centre has reformed customary law to complement statutory law.[162] Finally, the Centre is educating the people of South Sudan on national and customary laws. Overall, the Centre has improved the implementation of customary law in South Sudan.

Ndulo and others advocate that the African States should be part of international and regional human rights conventions and systems such as the Convention for the Elimination of All Forms of

[157] *Ibid* at 223.
[158] Leigh T Toomey, "A Delicate Balance: Building Complementary Customary and State Legal Systems" (2010)3:1 Law &Development 1 Review 157.
[159] *Ibid* at 178.
[160] *Ibid* at 178.
[161] *Ibid* at 178.
[162] *Ibid* at 178.

Discrimination Against Women, the Maputo Protocol, and the African Charter on Human and Peoples' Rights.[163] This will lead to a comprehensive system of norm-setting backed by enforcement mechanisms. It will also provide a foundational framework within which women's rights can be advocated for and protected alongside other human rights.[164] States are also obligated to ensure that international human rights conventions are reflected in national constitutions and laws.[165] All African national constitutions must prohibit all forms of discriminatory customary laws that are contrary to international human rights provisions.

In the case of Ghana, the government has ratified several international and regional human rights instruments, such as the Convention on the Elimination of Discrimination against Women, the African Charter on Human and Peoples' Rights, and the Maputo Protocol.[166] However, these conventions that seek to protect fundamental human rights and freedoms have not significantly impacted the inheritance rights of women in Ghana due to their weak implementation.[167] I attribute the weak implementation of these international treaties to two main reasons: the dichotomy between cultural relativism and universalism and the dualist approach to treaty implementation.[168]

(a) Universalism versus Cultural Relativism

The rift between universalism and cultural relativism is one of the causes of Ghana's weak implementation of the ratified international treaties.[169] The state is faced with the challenge of promoting universal human rights and advancing cultural rights. It is a challenge to impose a

[163] Ndulo, *supra* note 54 at 114.
[164] *Ibid* at 114.
[165] *Ibid* at 114.
[166] 1992 Constitution of Ghana, Chapter 5.
[167] *Ibid.*
[168] Johanna E Bond, "CEDAW in Sub-Saharan Africa: Lessons in Implementation" (2014) Mich St L Rev 241.
[169] *Ibid* at 241.

Western concept focusing on individual rights that are the product of a specific historical development on cultures that have different value systems – communitarian, rather than individualistic.[170] The state must promote a dialogue between international human rights and cultural rights to advance the inheritance rights of women.[171] Ghanaians, including the judiciary, who interpret and apply the law have not fully embraced the international human rights regime.[172] When the judiciary reconciles international human rights law with customary law, the result will be the development of living customary law . The courts will no longer apply judicial customary law that discriminates against women but living customary law that reflects women's current contribution towards the acquisition and maintenance of matrimonial property.

Individual right is still a foreign concept to most Ghanaians and contrary to Ghanaian traditional values, which promote group rights. Even though the Constitution reflects human rights provisions, these provisions have little practical meaning to Ghanaians. International human rights can barely be called universal if they only reflect the preferences of a specific culture.[173] The historical model of human rights cannot respond to the needs of African countries except if there is a radical rethinking and restructuring of the international order, abandoning the efforts to universalize an essentially European regime of human rights.[174] It is important to break the hierarchical relationships between European and non-European populations and to

[170] *Ibid* at 241.
[171] Laurence Juma, "Reconciling African Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes" (2001) 14 Thomas L Rev 459.
[172]Hammond, "Towards an Inclusive Vision of Law", *supra* note 127 at 172.
[173] *Ibid* at 172.
[174] Mutua Makau, "Savages, Victims &Saviours, The Metaphor of Human Rights" (2001) 42:1 Harvard Int'l J 201-245.

multiculturalize the human rights regime in some areas, like balancing individual and group rights.[175]

How can the credibility of these international human rights standards be enhanced at the national level? What strategies will promote and implement them more effectively? First, there must be strategies to promote the cultural legitimacy of human rights. These strategies include exploring the possibilities of cultural reinterpretation and reconstruction through internal cultural discourse and cross-cultural dialogue as a means of enhancing the universal legitimacy of human rights. Internal discourse refers to the struggle to create enlightened perceptions and interpretations of cultural values and norms.[176] There may be room for amending a cultural position from within through internal discourse about the fundamental values of the culture and the reasoning for those values. The internal discourse about moral, social, and political issues is always taking place, and it should not be arduous to focus attention on the human rights implications of those issues.[177] The government can achieve public awareness through intellectual and scholarly debate, artistic and literary expression of alternative views on those issues, and political and social action furthering those views.[178] However, the advocates of alternative cultural positions on human rights issues should seek to achieve a broad and effective acceptance of their interpretation of cultural norms and institutions by showing the authenticity and legitimacy of that interpretation within the framework of their own culture.[179]Advocates of human rights should show the authenticity and legitimacy of human rights within the framework of their own culture, even when the very nature

[175] *Ibid* at 211.
[176] Ahmed Abdullahi An-Na'im, "A Quest for Consensus'' in Abdullahi Ahmed An -Na'im et al, eds, *Human Rights in Cross-Cultural Perspectives* (Pennsylvania: University of Pennsylvania Press,1992) 488.
[177] *Ibid* at 19.
[178] *Ibid* at 19.
[179] *Ibid* at 21.

and substance of the culture make it unlikely for human rights advocates to achieve complete success. The internal discourse approach can make a significant impact on the inheritance rights of women in Ghana.[180]

The next approach to enhance the universal legitimacy of human rights is cross-cultural dialogue. This approach does not expect that enough cultural support for the full range of human rights is either already present or completely lacking in any given cultural tradition. [181] Since cultures are frequently changing and evolving internally as well as through interaction with other cultures, it is possible to influence the direction of that change and evolution from outside through cross-cultural dialogue. Since cross-cultural interaction and mutual influence are always taking place, it should not be difficult to introduce some elements of the international human rights agenda into them.[182] There are already human rights effects of the processes of intercultural relations, but these tend to be incidental and somewhat random.[183] The approach to the cross-cultural legitimacy of universal human rights suggests that the processes of intercultural relations should be more intentional and effectively used to control cultural antagonism to human rights norms that are difficult in a given context.

Nevertheless, this process approach must be both mutual between cultures and sensitive to the needs of internal authenticity and legitimacy.[184] Those of one cultural tradition who wish to promote a change in attitudes within another culture must be open to a corresponding inducement concerning their own attitudes and be respectful of the integrity of the other culture.[185] They must

[180] *Ibid* at 21.
[181] *Ibid* at 24.
[182] *Ibid* at 24.
[183] *Ibid* at 24.
[184] *Ibid* at 24
[185] *Ibid* at 24.

never appear to be forcing external values in support of the international human rights standards they seek to legitimize within the framework of the other culture.[186] Legal reformers in Ghana should acknowledge that every cultural tradition has challenges with some human rights and needs to enhance the internal cultural legitimacy of those rights. Culture provides the context in which universal notions of rights must be interpreted and appropriated to be meaningful and effective.[187] There is also a need to encourage a genuine dialogue between and within cultures. The aim of the internal discourse and cross-cultural dialogue is to agree on a body of beliefs to guide action in support of human rights despite the disagreement on the justification of those beliefs.[188] Different cultures should engage in intercultural dialogue to decide on a set of beliefs that humanise all of us. These beliefs or common values are a set of universal moral principles that apply to all human beings regardless of socio-cultural context or situation.[189] One of these beliefs that should be used to champion human rights between different cultures is the belief of human dignity. The belief of human dignity states that all persons regardless of rank or social class have an equal intrinsic worth or dignity.[190] Human dignity is an innate worth or status that we did not earn and cannot forfeit. Women like all human persons have dignity that must be respected. The belief of human dignity should be used to promote the rights of women.

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[186] *Ibid* at 24.
[187] Ilias Bantekas & Lutz Oette, *International Human Rights Law and Practice*,2nd ed (Cambridge: Cambridge University Press,2016) 37.
[188] *Ibid* at 38.
[189] Sidi Omar & Fatuma Ahmed Ali, "Universal Protection of Human Rights: A Cross-Cultural Perspective" (2010) 2:1 Journal of Language Technology & Entrepreneurship in Africa 316. The belief of human dignity is grounded on Immanuel Kant's viewpoint on human dignity. According to Kant, human beings have dignity that must be respected.
[190] *Ibid* at 316.

(b) Dualist Approach to Treaty Implementation

Like most common law countries, Ghana has a dualist approach to treaty implementation which hinders the effective implementation of these treaties.[191] The dualist approach to treaty implementation means that the international treaties Ghana has ratified are not directly implemented unless the treaty is incorporated into the country's domestic laws. The Constitution of Ghana does not explicitly state the relationship between international law and national law, nor is international law recognized as a source of law by the Constitution.[192] However, the Constitution requires the state to "promote respect for international human rights law, treaty obligations and settlements of international disputes by peaceful means and to comply to treaties of international organizations to which Ghana is a member."[193] Therefore, these ratified conventions are not binding unless they are incorporated into the domestic laws of Ghana. The effect of this dualist approach to treaty implementation is that a right enshrined in an international convention that the government of Ghana has ratified cannot be stated in the national courts unless legislation has incorporated the right into the domestic law. [194]As a result, some lawyers in Ghana are unwilling to use these international human rights conventions because they have not been incorporated into domestic laws.[195] In some cases, the courts have dismissed human rights claims enshrined in international human rights conventions because the international laws were not incorporated into

[191] Michael Gyan Nyarko, "The Impact of the African Charter and Maputo Protocol in Ghana" in VO Ayeni, ed, *The Impact of the African Charter and Women's Protocol in Selected African States* (South Africa: Pretoria University Law Press,2016) 95-113.
[192] Article 11 of the 1992 constitution of Ghana does not acknowledge international law as a source of law in Ghana.
[193] 1992 Constitution of Ghana, art 40.
[194] Emmanuel V Oware Dankwa, "Implementation of International Human Rights Instruments: Ghana as an Illustration" (1991) 3 Annual Conference -African Society of International & Comparative Law 57-64.
[195] Gyan Nyarko, *supra* note 189 at 113.

Ghanaian laws.[196] The dismissal of human rights claims enshrined in international human rights denies Ghanaians certain universal human rights and freedoms enshrined in international and regional human rights treaties.

In 2008, the African Commission led by Ngary Bitaye embarked on a promotional mission to Ghana. The delegation met and deliberated with the Minister of Foreign Affairs, the Commission on Human Rights and Administrative Justice, the Ghana Journalist Association, Ghana Police Service Non-governmental Organisations, the Attorney General, the Chief Justice, the Law Faculty of the University of Ghana, and Correctional Services.[197] One of the delegation's issues was the importance of domesticating the African Charter and other international human rights conventions ratified by Ghana.[198] Nonetheless, no significant change has occurred more than a decade after the delegation's visit to Ghana.[199] The non-domestication of these international and regional human rights conventions has hindered their full and effective enforcement, particularly in human rights litigation.[200] Ghana must incorporate ratified international and regional human rights laws into its domestic laws to ensure effective implementation. The court can refer to these international and regional human rights to ensure that women have a fair share of their inheritance rights. Treaties such as the Convention on the Elimination of all Forms of Discrimination against Women and the Maputo Protocol contain provisions that specifically protect women's inheritance rights. For example, Article 21 of the Maputo Protocol states that "a widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right

[196] In *Issa Iddi Abass & Another v Accra Metropolitan Assembly & Another*, Misca 1203/2002(24 July 2002). In this case, the high court rejected the argument on the right to housing enshrined in international human rights instruments.
[197] Gyan Nyarko, *supra* note 189 at 113.
[198] *Ibid* at 113.
[199] *Ibid* at 113.
[200] *Ibid* at 113.

to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it."[201] In addition, Article 16 (1) (h) of the Convention on the Elimination of All Forms of Discrimination against Women states that "states parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure , on the basis of equality of men and women, the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property."[202] These treaties should influence judicial decisions in intestate succession cases to protect the inheritance of women.

The Ghanaian judiciary should also attempt to use the jurisprudence of major international human rights bodies, such as their decisions, general comments, and concluding observations, to give more effect to these international treaties.[203]

In Namibia, the court applies international law unless otherwise stated by the Constitution or an act of Parliament.[204] Likewise, Section 231(4) of the South African Constitution permits the courts to apply a "self-executing provision" of a treaty even if the legislature has not promulgated the treaty into law.[205] In Malawi, the Constitution provides that those international conventions ratified before the adoption of the 1994 Constitution, including international human rights conventions,

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[201] Article 21 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, signed 11th July 2003 and effective 25th November 2005.

[202] Article 16(1) (h) of the Convention on the Elimination of All Forms of Discrimination against Women, signed 18th December 1979 and effective 3rd September 1981.

[203] Emmanuel K Quansah, "An Examination of the Use of International Law as an Interpretive Tool in Human Rights Litigation in Ghana and Botswana" in Magnus Killander, ed, *International Law and Domestic Human Rights in Africa* (South Africa, Pretoria University Law Press,2010) 37; For example, the courts can refer to the CEDAW Committee general recommendation No.21 which emphasises on states' obligations to protect, respect, and fulfil women's equal rights with men with respect to owning property.

[204] 1990 of the Namibian Constitution, art 144. Article 144 states that "international agreements binding upon Namibia shall form part of the law of Namibia".

[205] Quansah, *supra* note 201 at 37. See also *Government of RSA and others v Grootboom and others* (CCT11/00) (2000) ZACC 19, para 26. In this case, the South Africa Constitutional Court held that "where the relevant principle of international law binds South Africa, it may be directly applicable."

are part of the national laws.[206] The treaties ratified after the adoption of the 1994 Constitution are incorporated into the national laws.

Similarly, in Zimbabwe, international human rights conventions ratified before the amendment of the 1993 Constitution are part of the domestic laws and can be applied in human rights litigations.[207] Finally, though a traditional dualist country, Kenya has changed its constitutional provisions to make ratified international human rights conventions directly applicable in Kenya with or without legislative domestication.[208] The domestication of these international conventions in the laws of these countries has promoted the implementation of human rights.[209] For example, in Kenya the domestication of international conventions has promoted the inheritance rights of women. In *Rono v Rono,* judges applied the Convention on the Elimination of Discrimination against Women and the Universal Declaration of Human Rights to ensure that the daughters of the deceased received a fair share of their father's estates.[210]

I have highlighted the importance for Ghana to integrate international human rights law into its legislative framework. However, international human rights law is critiqued for its strong universal tendencies and Eurocentric orientation. As such, international human rights law is critiqued for not being responsive to the needs of African countries.[211] Therefore, for international human rights law to be effectively implemented, it must reconcile with existing customary laws. This means that

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[206] Trier T Hansen, "Implementation of International Human Rights Standards through National Courts in Malawi" (2002) 46 Journal of African Law 31-42.

[207] *Kachingwe and ors v Minister of Home Affairs and Commissioner of Police No SC 145/04; ILDC 722* (*ZW 2005),* para 64.

[208] Victor Oluwasina Ayeni, *The Impact of the Africa Charter and the Maputo Protocol in Selected African States* (South Africa, Pretoria University Law Press, 2016) 14.

[209] Countries including Kenya has made an impact in promoting women's inheritance rights by applying international human rights incorporated in their domestic laws. In Kenya, the cases of *Rono v Rono (*2005) AHRLR 107 (KeCA 2005) & *Re Estate of Lerionka Ole Ntutu* (2008) *eKLR,* the court applied international conventions in succession cases to safeguard the inheritance rights of women.

[210] *Ibid.*

[211] Bhupinder S Chimni, "Third World Approaches to International Law: A Manifesto" (2006) 8 International Community Law Review 3-27.

international human rights must be translated into local terms. The court cannot champion the individual rights in a country that practises communal rights without making universal human meaningful in the local context. The judiciary must apply international human rights law and living customary law which reflects the underlying principles of customary law. The judiciary reconciling both international human rights law and customary law will also ensure that the people do not regard international human rights as a radical intrusion into their existing customary laws.

Additionally, intermediaries including non-governmental organisations and local leaders play a key role in translating human rights approaches from the global arena to the local settings.[212] These intermediaries are "knowledge brokers" who understand both universal human rights and local cultural practices and can mediate between two culturally different worlds.

Commendable efforts have already been started by NGOs in Ghana, such as Women in Law and Development Ghana, (WILDAF) and the International Federation of Women Lawyers (FIDA), Ghana. These non-governmental organisations organize educational programs throughout the country to create awareness of the dangers of some discriminatory cultural practices.[213]

I recommend that non-governmental organisations use "home-grown" solutions to promote women's inheritance rights in Ghana. These non-governmental organisations can play a key role in the "vernacularization" or "indigenization" of international human rights in the local context.[214] They can put universal human rights ideas into known symbolic terms and employ stories of local

[212] Sally Engle Merry, "Transnational Human Rights and Local Activism: Mapping the Middle" (2006) 108:1 American Anthropologist 41.
[213] Jean Marie Fenrich &Tracy Higgins, "Promise Unfulfilled: Law, Culture and Women's Inheritance Rights in Ghana" (2001)25:2 Fordham Intl LJ 321.
[214] Engle Merry, *supra* note 210 at 44.

injustices and abuse to give life and power to international movements.[215] They can reformulate local grievances by presenting them as human rights abuses and interpret universal ideas and practices as ways of addressing specific local problems.[216] They can reinterpret transnational ideas in local terms, and simultaneously they reinterpret local ideas and challenges in the language of international human rights.

Non-governmental Organisations can find these "home-grown" remedies by critically studying the socio-cultural context within which human rights are violated.[217] In applying these "home-grown" solutions, the translators only rely on local values and beliefs rather than incorporating western concepts. In Africa, religion provides an essential receptor for human rights. According to a study carried into the human rights culture of the Akans in Ghana, religion plays an essential role in everyday life, and it has a primary effect on their human relations.[218] Like other Africans, the Akans are encouraged to be good to each other as they strongly believe that it is the preeminent way to express the will of God in their everyday life. The Akan society is a society where religion and everyday social actions are linked together to the extent that all significant actions should comply with the will of God. According to Danquah, among the Akans:

> True culture is ethical, not material. Hence, among the Akans, the 'tool' of their civilization is almost indiscoverable: it is with them, a matter of spirit. Everything else has value only in its relation to the ideal of God as the 'tool' of their culture. Here, all are for each; for all are of the ancestor of the family, be he a Chief or Emperor, or merely a patriarch. In the end we will find that the quest for God in Akan land is a quest of their culture, their politics, their economics, and the spirit of their art and life. [219]

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[215] *Ibid* at 45. Engle Merry gives practical examples of how translators in Hong Kong and Hawaii have translated international human rights into local terms. These translators have made major impact in reducing discrimination in communities in these countries.
[216] *Ibid* at 44.
[217] Tom Zwart, "Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach" (2012) 34: 2 Hum Rts Q 546.
[218] *Ibid* at 546.
[219] Joseph B Danquah, *The Akan Doctrine of God* (Lutterworth: London,1944)3-4.

As such, within the Akan community, human rights culture has a strong religious foundation.[220] The significance of religion as a means to champion universal human rights is usually overlooked or ignored by Westerners because of their point of view that religion should be separated from the state and the opinion that universal human rights must assist a modernization agenda.[221] Improvements in the field of universal human rights can be promoted by relying on the positive aspects of religion and the beliefs of the people. For example, in succession, the Akan ethnic group and other ethnic groups who share similar religious beliefs must be encouraged to provide for the maintenance and basic needs of the widows and their children, which resonates with their religious beliefs to do good for each other. It is believed that doing good to another person translates into doing good to oneself.[222] There is an Akan Adage that says, "woye bone a woye fa, wo ye papa a wo ye fa," meaning if you do good, you do it for yourself, if you do bad, you do it for yourself.[223] Non-governmental organisations can appeal to the existing culture and religious beliefs of the people to promote human rights. According to An-Naim, "people are more likely to observe normative propositions if they believe them to be sanctioned by their own cultural traditions, observance of human rights standards can be improved through the enhancement of the cultural legitimacy of those standards."[224]

Non-governmental organisations must collaborate with community leaders to educate the local people on equal inheritance for women. These community leaders are the custodians and gatekeepers of customary law. They command respect from their people. Additionally, in rural

[220] Richard Amoako-Baah, *Human Rights in Africa: The Conflict of Implementation* (PhD Dissertations: University of Tennessee,1999) 192.
[221] *Ibid* at 180.
[222] *Ibid* at 180.
[223] *Ibid* at 180.
[224] Ahmed Abdullahi An Naim, *Human Rights in Cross Cultural Perspectives* (Philadelphia: University of Pennsylvania Press,1990) 20.

Ghana where local people practise the traditional religious belief, the traditional leaders are perceived as the connection between the people and the spiritual world. Therefore, these traditional rulers are influential in their communities.[225] Therefore, they must be the first to consult in translating human rights approaches in the local settings. Non-governmental Organisations must educate and dialogue with these chiefs in local communities. NGOs must embark on village-to village seminars and interact with chiefs, queen mothers and other opinion leaders on the importance of equal inheritance rights.[226]These seminars can also be organised at the national level to educate other opinion leaders. Non-Governmental Organisations must emphasise the importance of giving women an equal share of their deceased spouse properties. Non-Governmental Organisations must stress on the fact that giving widows a fair share of the estates will reduce destitution and poverty of widows and their children. I argue that change that emanates from within would last longer. The official, legalistic, top-down approach estranges the local people and does not last permanently.[227] A culturally sensitive approach grounded on dialogue, education, and negotiations, which seeks to involve the participation and corporation of the people is an effective way of reconciling these two normative orders.

There is also a need for other initiatives to be put in place after the domestication of these international treaties and translating human rights into local terms. First, international bodies have a role in ensuring that these international and regional conventions are effectively implemented.[228] International bodies such as the Committee on the Elimination of All Forms of Discrimination

[225] Tompson Makahamadze, Nesbeth Grand & Baxter Tavuyanago, "The Role of Traditional Leaders in Fostering Democracy, Justice and Human Rights in Zimbabwe" (2009) ½: 16 The African Anthropologist 33-47.
[226] Robert Kwame Ameh, "Reconciling Human Rights and Traditional Practices: The Anti-Trokosi Campaign in Ghana" (2004) 19:2 Can J L& Soc'y 71.
[227] *Ibid* at 72.
[228] Gyan Nyarko, *supra* note 189 at 113.

against Women and regional bodies such as the African Commission must ensure that state parties such as Ghana submit their periodic state reports.[229] Ghana's failure to regularly submit state reports has hindered these bodies from assessing Ghana's progress and compliance with the Convention on the Elimination of All Forms of Discrimination against Women, the African Charter on Human and People's Rights, the Maputo Protocol, and other international conventions.[230] For instance, since the ratification of the African Charter, Ghana has submitted only two state reports to the African Commission. Ghana presented its first state report in 1993 and the second in 2001.[231] Ghana has several overdue state reports to submit to the African Commission.[232] Non-governmental organizations have also failed to frequently submit alternative reports, usually done through a consultative process between non-governmental organizations' coalitions.[233] The Ministry of Foreign Affairs and the Attorney General's office in Ghana must collaborate to submit periodic state reports. This will enable international bodies to assess Ghana's compliance with its international obligations to enforce international conventions.

Secondly, the domestication of international human rights treaties is insignificant if the judiciary and members of the public do not have basic knowledge about these international conventions. Increased awareness of these international treaties and how to use them in a particular domestic context to address human rights issues is necessary to improve the impact of international treaties in Ghana.[234] To create awareness, international human rights law must form part of the legal training of the Ghanaian judiciary. Presently, international law is part of the curriculum of law

[229] *Ibid* at 113.
[230] *Ibid at* 113.
[231] *Ibid* at 116.
[232] *Ibid* at116.
[233] *Ibid* at 116.
[234] Quansah, *supra* note 201 at 19.

faculties. Nonetheless, international human rights law is not usually a specialization field in law faculties. Law schools must train the judiciary to acquire knowledge in international human rights law and make legal arguments using international human rights provisions in litigations. Similar initiatives have been enforced in other countries to influence judges to become friendlier to international human rights law.[235] For example, the Francophone Africa Supreme Courts Association has organized international human rights courses for judges at national schools of judicial training in Benin, Burkina Faso, and Senegal. Judges from both sides of the common law-civil law divide have organized seminars in West Africa.[236] A Judicial Studies Institute was established in 2004 in Uganda under the patronage of the judiciary to provide human rights training to judges and practising lawyers.[237] One of the aims of the East African Magistrates and Judges Association, with its headquarters in Arusha, Tanzania, is to "promote and protect human rights."[238] The South African Chief Justice Forum organizes annual conferences on human rights issues.[239] The International Law in Domestic Courts (ILDC) Africa project has organized workshops for judges in East Africa and Nigeria and lawyers from Southern and West Africa.[240] In Niger, international human rights law publications are made available to magistrates and judges.[241] Finally, the Nigeria Institute of Advanced Legal Studies has an electronic publication on "Africa and International law in the 21st century" which is accessible to the public including judges.[242]

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[235] *Ibid* at 19.
[236] The West African Judicial Colloquia, Dakar, Senegal, January 2006, Accra, Ghana,2007, <http://www.brandeis.edu/ethics/pdfs/internationaljustice/WAfrica Colloq.pdf >.
[237] Judicial Studies Institute of Uganda<http://www.judicature.go.ug/Uganda/index.html>.
[238] *Ibid.*
[239] Quansah, *supra* note 201 at 19.
[240]*Ibid* at 19.
[241] Ministere de la Justice (Niger) Manuel des Droits de L'Homme a L'Homme a L'Usages des Magistrates (2009).
[242] The Nigerian Institute of Advanced Legal Studies < http:// nails-nigeria.org>.

Judges and lawyers must be equipped with knowledge and skills to promote the effective implementation of international human rights. Additionally, the government must educate members of the public on international human rights conventions. When people, especially women, are educated, they will know their rights and the institutions to seek legal redress in cases of discrimination.[243] The government of Ghana can find some best practices in Tanzania, where the government often organizes "dissemination workshops" after receiving copies of concluding observations of the African Commission. The African Charter has been translated into the local language (Amharic) and distributed to the public in Ethiopia. Likewise, Nigeria translated the Maputo Protocol into local languages before ratification.[244] These are best practices for Ghana to emulate regarding creating awareness of international conventions among the judiciary and members of the public.

Since Ghana has ratified these international treaties, it is bound by the principle of *pacta sunt servanda,* to meet the aims and objectives of the treaties.[245] According to Article 38 of the Statute of International Court of Justice, custom is an important source of international law.[246] As such, even in the case of human rights treaties not ratified by Ghana, human rights norms reflected in the treaties constitute binding obligations in Ghana under international customary law. Therefore, Ghana must perform its obligations as a state party to respect, protect and fulfill its international obligations.[247] African states such as Ghana must take all appropriate means to enforce these international instruments and not merely ratify these conventions for the optics of international relations.

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[243] Oluwasina Ayeni, *supra* note 206 at 14.
[244] *Ibid* at 14.
[245] *Ibid* at 14. Pacta Sunt Servanda means "agreements must be kept". Without such a principle, no international agreement would be binding or enforceable.
[246] Statute of International Court of Justice, art 38.
[247] *Ibid* at 14.

3.5 Conclusion

This chapter explains the effects of the doctrine of judicial precedent on women's inheritance rights in Ghana. Judicial customary law, which are precedents of customary law cases applied in the Ghanaian courts, is static and no longer ensures equality in the inheritance regime, as it contains old inheritance practices that continue to favour men.[248] I argue that the court has a role in ensuring that judicial customary law is reformed and developed to address the inequality women face regarding inheritance rights. First, the courts need to overcome judicial passivity and hold a progressive view of customary law, especially towards customs and traditions that perpetuate the discrimination women face in claiming their inheritance rights.[249] The court must consider socio-economic changes in Ghanaian society, including women's current contribution toward the acquisition and maintenance of matrimonial property. The court should declare customary laws of succession that discriminate against women unconstitutional**.**

The court should also consider the evolutionary nature of customary law. There are foundational values that underpin people's adaptation of customs to socio-economic changes.[250] There is a need for the court to focus on the underlying principles that prompt, inform and guide people's adaptation of customs to meet their social needs.[251] Ascertaining and applying a customary law that reflects socio-economic changes is a big task for the court. However, the court can achieve this, with the assistance of important stakeholders such as the National House of Chiefs and the state. The National House of Chiefs has a constitutional mandate to perform according to Article

[248] Diala, "A Critique of the Judicial Attitude", *supra* note 13 at 108.
[249]Ndulo*, supra* note 54 at 102.
[250]Diala, "A Critique of the Judicial Attitude", *supra* note 13 at 108.
[251] *Ibid* at 108, see also Hammond, "Reforming the Law of Intestate Succession", *supra* note 45 at 114-139.

272(b) of the Constitution: "undertaking the progressive study, interpretation, and codification of customary law to evolve, in appropriate cases, a unified system of rules of customary law."[252] Therefore, the court can refer to the study of customary law carried out by the National House of Chiefs to ascertain a living customary law that reflects socio-economic changes.

The state has a role to play in complementing the work of the judiciary. The government must ensure that ratified international and regional human rights conventions such as the Convention on the Elimination of All Forms of Discrimination against Women, the African Charter on Human and Peoples' Rights, and the Maputo Protocol are incorporated into Ghana's domestic laws.[253] Ghana can emulate a few other common law countries, including Kenya, Malawi, Namibia, and South Africa, that have incorporated international treaties into their domestic laws. Several provisions in international and regional human rights laws safeguard the property rights of women.[254] The court can apply these international and regional human rights conventions in intestate succession cases to protect the rights of women. Finally, I also highlight that human rights can only be effective if it is interpreted into local terms. Non-governmental organisations and traditional leaders can play a key role in translating the human rights into local terms. Commendable efforts have already been started by NGOs in Ghana, such as Women in Law and Development (WILDAF) Ghana, and the International Federation of Women Lawyers, (FIDA)

[252] 1992 Constitution of Ghana, art 272(b).
[253] Ndulo, *supra* note 54 at 114.
[254] Examples include Article 16 (1)(h) of the Convention on the Elimination of Discrimination against women states that "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations, and in particular shall ensure on a basis of equality of men and women, the same rights for both spouses in respect of the ownership, acquisition, management, administration ,enjoyment and disposition of property, whether free of charge or for a valuable consideration", Article 15(1) of CEDAW states that " States Parties shall accord to women equality with men before the law." & Article 15(2) also states that "State Parties shall accord to women in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. They shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals."

Ghana. These non-governmental organisations organize educational programs throughout the country to create awareness of the dangers of some discriminatory cultural practices.[255]

I recommend that non-governmental organisations use "home-grown" solutions to promote women's inheritance rights in Ghana. These non-governmental organisations can play a key role in the "venularization" or "indigenization" of international human rights in the local context.[256] They can put universal human rights ideas into known symbolic terms and employ stories of local injustices and abuse to give life and power to international movements.[257] According to a study carried into the human rights culture of the Akans in Ghana, religion plays an essential role in everyday life, and it has a primary effect on their human relations.[258] For example, in succession, the Akan ethnic group and other ethnic groups who share similar religious beliefs must be encouraged to provide for the maintenance and basic needs of the widows and their children, which resonates with their religious beliefs to do good for each other. Non-governmental Organisation should also collaborate with traditional leaders who are very influential in the local communities. These traditional leaders can assist in translating international human rights in the local communities through dialogues, negotiation, and education. Additionally, some initiatives must be in place after the domestication of these international conventions. International bodies such as the African Commission and Committee on the Elimination of All Forms of Discrimination must assess Ghana's compliance with its international obligations to enforce these international

[255] Fenrich &Higgins, *supra* note 211 at 321.
[256] Sally Engle Merry, "Transnational Human Rights and Local Activism: Mapping the Middle" (2006) 108:1 American Anthropologist 41.
[257] *Ibid* at 41.
[258] *Ibid* at 41.

conventions. This means that Ghana has a responsibility to submit its state report in due time. The government must also educate the judiciary and the public on these international conventions. Increased awareness of these conventions will promote effective implementation.

Chapter 4: THE DOCTRINE OF REPUGNANCY AND CUSTOMARY LAW IN GHANA

4.1 Introduction

This chapter seeks to engage critically in the analysis of the continued relevance and status of the doctrine of repugnancy as applied by the court in Ghana to resolve women's property and inheritance rights. I interrogate the efficacy and validity of the repugnancy doctrine using a post-colonial framework aimed at exposing the interaction between pre-colonial and post-colonial structures and institutions within the legal system and its effects today. This analysis will highlight whether the court should still maintain the repugnancy doctrine in assessing the customary law of succession in Ghana and its repercussions on the inheritance rights of women.

In 1876, a Supreme Court was set up in the Gold Coast as the Supreme Court of record with jurisdiction and authority like those of Her Majesty's High Court of Justice in England. The Supreme Court was empowered to administer the common law, the doctrines of equity, and the statutes of general application in force in England as of 24 July 1874.[1] The Ordinance, which set up the Supreme Court, stated that a person could benefit from customs existing within the jurisdiction of the court provided that such laws and customs are not repugnant to "natural justice, equity and good conscience."[2] In terms of these provisions, the British colonial rulers did not eliminate the customary laws, however, they subjected their recognition and validity to the permissible extent of English principles and concepts through the repugnancy doctrine.[3] The existence of a rule of customary law within a particular community is one thing, and its recognition by the courts is quite another thing. This is because, notwithstanding proof of the existence of such a custom by the parties, the court must consider whether or not the custom is not repugnant to

[1] Isabel Moodley, *The Customary Law of Intestate Succession* (PhD Dissertation, University of South Africa,2012).
[2] Supreme Court Civil Procedure of 1954.
[3] Moodley, *supra* note 1 at 160.

"natural justice, equity, and good conscience" before it can adapt it as having the force of law. This position continues to date. Before a rule of customary law is considered as having the force of law, it must pass the validity test based on the British concept of repugnancy.[4] However, the repugnancy doctrine has received diverse criticisms due to controversies and inconsistencies surrounding its precise meaning. According to most scholars, the elements, "natural justice, equity and good conscience" have no precise definition.[5] The three elements in the phrase are "overlapping and indistinguishable."[6] According to Chief Justice Speed,

> I am not sure that I know what the terms natural justice and good conscience mean. They are high-sounding phrases, and it would, of course, not be difficult to hold that many of the ancient customs of the barbaric times are repugnant thereto, but it would not be easy to offer a strict and accurate definition of the terms.[7]

Secondly, the repugnancy doctrine is connected and interpreted with the principles of English law. As a British-oriented legislation, it was based on principles of British morality.[8] During the colonial period, given that those traditionally exercising the authority to hold laws to be repugnant were British or British-trained judges, the repugnancy doctrine enforced British-based morality.[9] According to Sidney Abrahams in his speech at the London School of Economics:

> How do you justify the application of English principles of justice to so many different peoples whose outlook and mentality vary so much from our own, especially when English ideas pass their understanding? We believe that these ideas are the best that can regulate

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[4] *Ibid* at 60.
[5] Elijah A Taiwo, "Repugnancy Clause and its Impact on Customary Law: Comparing the South African and Nigeria Positions-Some Lessons for Nigeria" (2009) 34:1 Journal for Juridical Science 89-115.
Taiwo and other scholars including Owino have attributed the non-uniformity in the application of the repugnancy clause to the absence of a precise meaning.
[7] *Lewis v Bankole* (1908) NLR 83 at 84.
[8] Nonso Okereafoezeke, Judging the Enforceability of Nigeria's Native Laws, Customs and Traditions in the Face of Official Controls, Presented at East Carolina University-Greenville at the Southeastern Regional Seminar in African Studies (Greenville, South Carolina,2001) 243.
[9] *Ibid.*

> our administration of justice, and an Englishman, because he is an Englishman and not someone quite different, cannot adopt other persons' conception of justice.[10]

Marasinghe also states that:

> There is a danger built into the approach, where English standards of justice and law are utilized for the determination of whether a rule of native law and custom passes the required repugnancy test.[11] The problem with assessing customary law based on the foreign concept is that customary law would, over the years, disappear as a living system of laws.[12]

The repugnancy doctrine results in uncertainty in the application of customary law in most post-colonial African countries. Before delving into the Ghanaian case, it is worth mentioning how the undefined method of application of the repugnancy doctrine has introduced uncertainty into customary law practice in most African courts. This reflects in the contrasting decisions of courts in some African jurisdictions. For example, in the *Estates of Agboruja* (Nigeria case) and *David Tchakokam v Keou Magdaleine* (Cameroon case), the courts arrived at different conclusions.[13] In both situations, the courts were asked to determine whether the system of levirate marriage under customary law was repugnant to "natural justice, equity or good conscience."[14] A levirate marriage is a system of marriage where the wife of the deceased spouse is given or married to another member of the family. In the *Estate of Agboruja*, the court accepted the system of levirate marriage. The court held that:

> The custom by which a man's heir is his next male relative, whether brother, son, uncle or even cousin is widespread throughout Nigeria. When they are minor children, it means that their father's heir becomes their new father. This is a real relationship, and the new

[10] Ekow WC Daniels, "The Influence of Equity in West African Law" (1962) 11:1 International and Comparative Law Quarterly 49; see also Sir Sidney Abrahams, "The Colonial Legal Service and the Administration of Justice in the Colonial Dependencies" (1948) 30:3 J Comp Leg & Intl L 8.
[11] Marasinghe Lakshman, "Customary Law as an Aspect of Legal Pluralism: Whether Particular Reference to British Colonial Policy" (1998) 25 JMCL 7-44.
[12] *Ibid* at 35.
[13] *David Tchakoam v Keou Magdaleine* (suit No.HCK/AE/K38/97/32/92; 1999 Estates of Agbonja (1949) (1949) 19NLR 38.
[14] *Ibid.*

> fathers regard the children as their own children. Whenever this custom prevails, traditional courts follow it, and no doubt somewhere or in this large country this is being done every day.[15]

On the other hand, the court gave a different opinion in *David Tchakokan v Keou Magdaleine*.[16] The court rejected the practice as not only being repugnant but also contrary to written law. At the death of the widow's husband, she was forced to marry the nephew of the deceased husband. The new "husband" stated claims over the property left behind by the widow's deceased husband.[17] He stated that the widow was an object of inheritance and was therefore not permitted to own property.[18] The court relying on Section 27 of the Southern Cameroon High Court Law,1955 ruled in favour of the widow, gave her title over the contested estates, and declared their levirate marriage invalid. The presiding judge stated that:

> All in all, I am unable to find that there was ever a customary levirate marriage between plaintiff and defendant and even if there were the law will not give its blessing to a marriage that is not only obnoxious and repugnant to natural justice but obviously against the written law. Section 27 of the Southern Cameroon High Court Law clearly does not permit this court to enforce a marriage which is liable to be voided under our law.[19]

Even though these two cases are obtained from two different jurisdictions, the applicable rules are the same as Anglophone Cameroon and Nigeria share similar legal traditions. However, the judges arrived at different conclusions. Whereas the Nigeria judge saw the practice as not being repugnant because of the benefits it gives the family, his Cameroonian counterpart rejected the customary law as repugnant based on morality and fairness.[20]

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[15] *Ibid.*
[16] *David Tchakokam v Keou Magdaleine* (Suit No.HCK/AE/K38/97/32/92).
[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid.*
[20] Anthony Tchana Nzouedja, "Repugnancy and Incompatibility Clauses and their Impact on Customary Law: Some Lessons for Cameroon" (2021) 2 Zien Journal of Social Sciences &humanities 14-26.

The undefined scope of the repugnancy doctrine has also resulted in uncertainty in the inheritance regime in Ghana. This uncertainty is best illustrated in the differing decisions in the cases of *Quartey v Martey*, *Re Whyte*, and *Loromekoe v Nkegho*.[21] In *Quartey v Martey,* the court did not consider the rule of customary law where the intestate property of the deceased becomes family property contrary to natural justice, equity, and good conscience.[22] However, in *re Whyte,* the court found the Fanti customary law as repugnant to natural justice, equity, and good conscience. According to the Fanti customary law, the family demanded that the custody of the child should rest with the father's successor and not the widowed mother. This was for the father's successor to take care of the child.[23] Similarly, in *Loromeke v Nkegho*, a Ghanaian court declared an Urhobo (Nigerian) customary norm repugnant to natural justice, equity and good conscience. This norm stated that if a widow refused to accept the new husband offered by her deceased husband's lineage, she was obligated to give them custody of her children by the deceased.[24] On what basis was customary law in *Quartey v Martey* accepted, and on what basis was the Fanti customary law and Urhobo custom in *re Whyte* and *Loromeke v Nkegho* respectively rejected?[25] Due to the absence of a clear standard, the Ghanaian judiciary accepted or rejected the customary law of succession based on their own interpretation of "natural justice, equity ad good conscience". Judges used their discretion to determine which customary law of succession is acceptable and

[21] *Quartey v Martey* (1959) GL7 377, *Re Whyte* (1946) 18 NLR 70 & *Loromekoe v Nkegho* (1957) 3WALR 306.
[22] *Ibid.*
[23] *Ibid.*
[24] *Loromekoe v Nkegho* (1975) 3 WALR 306.
[25] *Quartey v Martey* (1959) GLR 377, *Re Whyte* (1946) 18 NLR 70 & *Laromekoe v Nkegho* (1957) 3 WALR 306.

which one is not.[26] I argue that in the cases above, women were left at the mercy of the judges and their understanding and interpretation of "natural justice, equity and good conscience".

In 1960, the Interpretation Act of Ghana eliminated the word repugnant.[27] However, the legacy of the repugnancy doctrine is still evident in Ghanaian legislation and judicial thinking.[28] Mensa-Bonsu wonders whether there is "a difference between what the courts are now empowered to do, and what the courts were doing during the colonial period and concludes that this is a distinction without a difference and serves no useful purpose."[29] Section 54 rule 6 of the Court Act 1993 still empowers the court to apply customary laws to meet the requirements of the contentious terms of natural justice, equity, and good conscience.[30] The courts are enjoined to apply remedies that appear efficacious and meet the requirements of equity and good conscience.[31] Ghanaian judges have yet to develop concrete, equitable standards to guide their interpretation of customary law.[32] In the era of colonial rule, the repugnancy doctrine represented the perspectives of the white colonial judges. In postcolonial Ghana, it reflects the views of the judiciary.[33] These judges have different values of what constitutes proper conduct. Since the terms natural justice, equity, and good conscience have no definite mode of application, the decision made on the customary law of

[26] Mikano E Kiye, "The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon" (2015) 15:2 African Studies Quarterly 92.
[27] Justice Modibo Ocran, "The Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa" (2006) 39:2 Akrom Law Review 13; The Interpretation Act 1960, (CA 4) s18(1).
[28] Enyinna S Nwauche, "The Constitutional Challenge of the Integration of Customary & Received English Law in Nigeria and Ghana" (2002) 25 Tul Eur& Civ LF 46.
[29] HJAN Mensa Bonsu, "Of Nuts in the Ground not being Groundnuts: The Current State of Customary Law in Ghana" (2002) 22 U of Ghana LJ 22.
[30] Section 54 of the Court Act 1993 states that "in the determination of any issue arising from customary law, the court may adopt, develop and apply such remedies as appear to the court to be efficacious and to meet the requirements of natural justice, equity and good conscience".
[31] Section 54 of the Court Act 1993, rule 7.
[32] Uche Ewelukwa, "Post Colonialism, Gender, Customary Injustice: Widows in African Societies" (2002) 24 Hum Rts Q 424.
[33] *Ibid* at 425.

succession is based on the discretion of the judiciary.[34]The judiciary using their discretion means that the terms natural justice, equity and good conscience will not be applied uniformly to eliminate discriminatory customary laws. In a patriarchal society such as Ghana, it is likely for some judges influenced by patriarchal tendencies to declare a discriminatory customary law of succession not contrary to natural justice, equity, and good conscience to disfavor women.[35] The overall consequence of the repugnancy doctrine is that it entrenches the inequality women face in claiming their inheritance rights.

4:2 Strengthening Customary Law: Rethinking the Doctrine of Repugnancy in Postcolonial Ghana

The effect of the repugnancy doctrine on the customary law of succession in Ghana has been far-reaching indeed. As stated above, the test has led to uncertainty in customary law, making it difficult for women to access a fair share of their inheritance.[36] The terms "natural justice, equity and good conscience" have no precise definition. Additionally, "natural justice, equity and good conscience" reflects English standards of justice and morality. Therefore, I argue that the court must replace the terms "natural justice, equity, and good conscience" as it is not useful in the interpretation of the customary law of succession.[37]

Constitutional human rights principles have become the current emancipatory concept relied on by several jurisdictions in sub-Saharan Africa to govern the values of African customary law. The Constitution is based on values, some of which are diametrically contrary to those espoused by

[34] Mikano, *supra* note 26 at 92, see also Pamela Amaechi & Erica Mildner, "The Dormant Clause: How the Failure of the Repugnancy Clause has Allowed for Discrimination against Women in Zambia" (2014) 1:1 South African Journal of Policy & Development 44.
[35] *Ibid* at 44.
[36] *Ibid* at 45.
[37] *Ibid* at 45.

customary law. [38] There is a need for the Ghanaian judiciary to extend its scope of application to incorporate constitutional provisions of equality and non-discrimination. These constitutional provisions of equality and non-discrimination promote gender equality. The courts have become over-dependent on the terms, natural justice, equity, and good conscience and have regrettably failed to incorporate the language of human rights.[39] Revoking the repugnancy doctrine would increase the demand for the use of constitutional provisions of equality and non-discrimination in the courts. It would also promote judicial certainty in applying customary law in the Ghanaian legal system.[40] When it emerged in the colonial era, the repugnancy doctrine was well-intentioned and capable of handling challenges in the period when most African countries were still under colonial rule.[41] In this era of constitutional rights, the repugnancy doctrine has become an ineffective and insufficient instrument to assess harm and mediate wrongs in post-colonial Ghana.[42] There should be decolonization of this colonial legal standard.

I, therefore, argue that the validity test for customary law should be living customary law and the Constitution of Ghana as it contains human rights provisions. The court must assess judicial customary law with living customary law. This means the court should ascertain the foundational values of customary law which is flexible and adapts to socio-economic changes. Assessing judicial customary law with living customary law means that judges will no longer rely on judicial customary law which contains old inheritance practices which disfavour women.

[38] Taiwo, *supra* note 5 at 93.
[39] *Ibid* at 93.
[40] *Ibid* at 93.
[41] *Ibid* at 93.
[42] *Ibid* at 93.

Additionally, the court must utilize principles of equality and non-discrimination in the Constitution for women to get a fair share of their inheritance rights. In Ghana, chapter five of the 1992 Constitution provides for basic rights and freedoms that are standards by which customary law can be assessed.[43] Examples of these fundamental rights and freedom include the protection offered to spouses by Article 22 to protect their property rights. As already stated in Chapter 1, women under the customary law system have no rights to the estates of their deceased husbands.[44] Depending on his lineage, his estates become the property of the matrilineal or patrilineal lineage. However, Article 22 of the Constitution stipulates that, "A spouse shall not be deprived of a reasonable provision out of the estates of a spouse whether the spouse died having made a will."[45]

Article 22(1) of the 1992 Constitution focuses on the property rights of spouses after the death of a spouse.[46] In accordance with Article 22(1), upon the death of one spouse, the surviving spouse can claim a reasonable share of the estate whether or not she was the beneficiary under a will.[47] The significance of article 22(1) of the Constitution "goes beyond the context of intestate succession to permit the court to override a will to provide a reasonable share to a surviving spouse." [48] It enshrines the constitutional right of a spouse to claim a part of the estate, though the portion to which she is entitled is subject to considerable judicial discretion.[49] The term "reasonable provision" in Article 22(1) gives the court the discretion to determine what share of the intestate property a surviving spouse can receive.[50] This means that the court must determine every case based on individual facts. Therefore, I am of the view that parliament must include a

[43] 1992 Constitution of Ghana, chapter 5.
[44] *Ibid* at art 22.
[45] *Ibid* at art 22(1).
[46]*Ibid* at art 22(1).
[47] *Ibid* at art 22(1).
[48] Nwauche, *supra* note 28 at 37.
[49] *Ibid* at 53.
[50] *Ibid* at 53.

more elaborate formula for Article 22(1), as the word "reasonable provision" is vague and leaves widows at the mercy of judges.[51] If parliament provides a more elaborate formula, the courts will give a fair percentage of the estates to surviving widows. I propose that parliament must make a law that gives the widow 50% or more of the estates of the deceased spouse depending on her contribution towards the acquisition and maintenance of matrimonial property. For this proposed law to be enacted, the Ministry of Women and Children's' Affairs in collaboration with non-governmental organisations should draft a proposal on the defects of the provisions of Article 22(1) and the relevant changes that will promote equality for women. This proposal should be submitted to the Attorney General's Department.[52] The legislative drafters of the Attorney General Department and the Ministry of Women and Children's affairs will continue to review and revise the proposal. The final draft will be submitted to parliament for their consideration and approval.

Another constitutional provision that the court could use for assessing customary law is Article 39(2) of the Constitution. Article 39(2) stipulates that "the state shall ensure that appropriate customary and cultural values are adapted and developed as an integral part of the growing needs of the society as a whole; and in particular that traditional practices which are injurious to the health and well-being of the person are abolished." [53] Article 39(2) contains two parts. The first part talks about the development and growth of customary law. The second part also encourages the court to eliminate traditional practices which are discriminatory.[54] Article 39(2) is particularly important because applying constitutional provisions of equality must not be portrayed as an

[51]Victor Gedzi, "PNDC Law 111 in Ghana and International Human Rights Laws" (2014) 2:2 Global Journal of Politics and Law Research 15-26.
[52] Human Rights Advocacy Centre, The Law-Making Processes in Ghana: Structures and Procedures (Ghana, 2011) p 8.
[53] 1992 Constitution of Ghana, art 39(2).
[54] *Ibid* at art 39(2).

attempt to westernize African societies.[55] To avoid the criticisms that individual rights are western concepts, non-discriminatory and important parts of the customary law should be preserved and developed. Agreeing with Babikar Mahmoud, "There are positive and negative elements in every culture. It is important to remain open and critical of ourselves".[56] The Ghanaian court should use constitutional provisions such as Articles 22 (1) and 39(2) of the Constitution in place of the repugnancy doctrine. The court should assess customary law of succession based on these constitutional provisions of equality and non-discrimination. The court must eliminate any customary law of succession which does not meet the requirements of Articles 22 (1) and 39(2) and discriminates against women. The courts applying these constitutional provisions of equality will ensure that widows have a fair share of their inheritance rights.

Even though, the use of constitutional provisions of equality and non-discrimination may be a valid replacement for the repugnancy doctrine, it would not solve one of the most perturbing issues related to contemporary customary law in Ghana.[57] How can change be facilitated in customary law by the people in the absence of the repugnancy doctrine? The repugnancy doctrine has made slow changes in social attitudes as customary law has shown resilience.[58] Repugnant customary values are still being recognized in society. Therefore, there is a gap between judicial customary law and customary law practiced by the people. Revoking the repugnancy doctrine would transfer the obligation of making changes in customary law from the courts back to the people.[59] Although customary laws are evolutionary, the evolution of customary law has not been reflected in the Ghanaian society, especially in rural areas, partly because of the conservative interpretation of

[55] *Ibid* at art 39(2).
[56] Fatima Babikar Mahmoud, *Are Human Rights Universal? Issues of Gender and Culture* (2004).
[57] Mikano, *supra* note 26 at 99.
[58] *Ibid* at 99.
[59] *Ibid* at 99.

customary law.[60] The jurisprudence of the Ghanaian court has been tailored towards eliminating the enforcement of barbaric customary practices without necessarily handling the underlying causes of such practices in society. Given this, it becomes difficult to change social attitudes. To ensure a change in social attitudes, there is the need to consider the socialization process that underpins customary laws. [61] There is a need for a social program that focuses on the socialization process instead of its side effects. The socialization process will need both sensitization and dialogue. [62]

Programs should begin within the community to encourage dialogue with community leaders and the community in general to find ways of encouraging changes in customary values that reflect constitutional provisions of human rights.[63] It is encouraging to see that local non-governmental organizations such as Women in Law and Development in Africa (WILDAF), Ghana and the International Federation of Women Lawyers (FIDA), Ghana are organizing educational programs throughout the country to create awareness of the dangers of some discriminatory cultural practices.[64] Some of these educational programs took place in Ho, Takoradi, and Accra to create awareness of the rights of women and the need to change discriminatory customary values in these communities. [65] Through these educational programs, some women are aware of their inheritance rights and the appropriate institutions to seek legal redress.[66]

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[60] *Ibid* at 99.
[61] *Ibid* at 99.
[62] *Ibid* at 99.
[63] *Ibid* at 99.
[64] Jean Marie Fenrich et al, "Promise Unfulfilled: Law, Culture, and Women's Inheritance Rights in Ghana" (2009) 25:259 Fordham Int'l L J 298.
[65] *Ibid* at 331.WILDAF has educated women and the public in general about discriminatory cultural practices including trokosi system and unequal devolution of intestate property.
[66] Through the educational programs of WILDAF, Ms Avorkliyah, a widow in Ho, sought help with WILDAF and filed a lawsuit at the Circuit Court to get a share of her husband's properties.

Women in Law and Development in Africa has introduced the Legal Awareness Programme (LAP), which promotes rights awareness and legal counseling services.[67] One notable feature of WILDAF is that it recognizes the need to find opportunities to reconcile both state law and customary law to eliminate the barriers to access to justice for women.[68] The International Federation of Women Lawyers, Ghana, educates women on their rights through workshops, free legal services, and translations. Each year FIDA organizes Legal Aid Clinics in the various regions of the country. The organization provides free legal aid and arbitration, representation in court for women who are not financially capable of hiring the services of a lawyer.[69]

Unlike the jurisprudence of the formal court, such changes that come from within the community will not be perceived as an imposition from the top but instead as reflecting the needs and aspirations of most people.[70] This is the only way social changes will obtain the respect and authority needed to foster a redirection in the community's perceptions. The people will have a feeling of ownership of the law and, with it, the legal process. Therefore, if effective measures are taken in this direction through seeking changes in the socialization process, there is a likelihood that the emerging socialization process would continually incorporate constitutional human rights values and living customary law.[71] Constitutional human rights values will in turn, respond to the aspirations of the socialization process in Ghana without those values necessarily breaking away from their core principles.

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[67] *Ibid* at 331. Women in Law and Development in Africa (WILDAF) gave free legal counselling to a widow, Ms Segbawu on her right to a share of her husband property as the family of her late husband wanted complete access to his estates.
[68] *Ibid* at 331.
[69] *Ibid* at 331.
[70] Gordan R Woodman, "Customary Law, State Courts and the Notion of Institutionalization of Norms in Ghana and Nigeria" *in Anthony Allott and Gordon R Woodman, eds, People's Law and State Law (*The Bellagio papers, Berlin, NY: De Gruyter Mouton, 2011) 354.
[71] *Ibid.*

4.3 Conclusion

This chapter investigates the contemporary relevance of the repugnancy doctrine and its effects on the inheritance rights of women. The undefined scope of the repugnancy doctrine has resulted in uncertainty in the application of the customary law of succession. Depending on a judge's understanding of the principles of natural justice, equity, and good conscience, a judge rejects or accepts the customary law of succession.[72] This means that a judge uses their own discretion to determine which customary law to apply and which customary law to reject. The judge may accept discriminatory customary law of succession depending on their understanding of the principles of natural justice, equity, and good conscience. This does not guarantee an equal inheritance for women.[73] I argue that Ghanaian women cannot continue to rely on legislation that does not guarantee equality. Judges must set aside the repugnancy doctrine as it no longer has contemporary relevance in the inheritance regime. The judiciary must develop concrete and equitable standards in interpreting and applying customary law.[74] Ghanaian courts must use living customary law and constitutional provisions to assess judicial customary law. Living customary law contains foundational values that is flexible and reflects socio-economic changes. Additionally, the courts must use constitutional provisions to ensure equal inheritance rights for women.[75] The Constitution has equality and non-discrimination provisions such as Article 22(1) and Article 39(2), which judges can use to assess the customary law of succession. The court must abolish any customary law of succession which violates Article 22(1) and Article 39(2) to safeguard the inheritance rights of women. Parliament must amend the word "reasonable provision" in Article 22(1) by enacting a

[72] Nwauche, *supra* note 28 at 61.
[73] *Ibid* at 61.
[74] *Ibid* at 61.
[75] *Ibid* at 61.

law that provides 50% or more of the estates of the deceased to the widow depending on her contribution towards the acquisition and maintenance of matrimonial property. I propose that the judiciary must use this law in the distribution of intestate property.[76]

Additionally, law reformers should consider the value of customary law in women's lives and its importance as a source of identity to the people. It is important to engage in consensus building before making efforts to amend the law. Reformers of customary law should avoid taking an abolitionist stance on discriminatory cultural practices without appropriate sensitization and public awareness. Taking an abolitionist stance will lead to a backlash against the people the law seeks to safeguard or even drive the people to perform the discriminatory practice underground.[77]
Therefore, there is a need for a social program that focuses on the socialization process to solve issues related to discriminatory customary laws in Ghana. This will need both sensitization and dialogue. It is encouraging to see local non-governmental organizations such as Women in Law and Development in Africa, Ghana (WILDAF) and the International Federation of Women Lawyers, Ghana (FIDA) organize educational programs throughout the country. These educational programs create awareness of the dangers of some discriminatory cultural practices.[78] .

[76] 1992 Constitution of Ghana, art 22(1).
[77] Woodman, *supra* note 70 at 143.
[78] Fenrich & Higgins, *supra* note 64 at 321.

CHAPTER 5: HARMONIZATION OF THE CUSTOMARY LAWS AND ENGLISH COMMON LAW IN GHANA

> What is to be done with African customary law is to study it more carefully. Whether the result is an African system with western trimmings, or a western system with African trimmings, the result will be the harmonization, by the people subject to these disparate laws of the exigencies and the rules of each system**.**
>
> -Anthony Allott

5.1 Introduction

The co-existence of the received English law and the existing customary laws has led to conflicts in Ghana. The conflict of laws has led to uncertainty in the administration of laws regulating intestate succession in Ghana. The judiciary is faced with a choice of law dilemma, deciding which of the laws to apply in intestate succession cases. The choice of law rules which are supposed to assist the judiciary in addressing the conflict of laws challenges, has shortcomings. Therefore, the choice of law rules does not purport to solve the conflict of laws in the Ghanaian legal system. This chapter spells out the existing choice of law rules regulating intestate succession in Ghana and how the conflict of laws affects women's' inheritance rights in Ghana. I also probe further into how to resolve the conflict of laws faced by the court to ensure equality for women in Ghana.

5.2 Choice of Law rules and Intestate Succession in Ghana

As stated at the beginning of this thesis, the Ghanaian legal system makes provision for different systems of intestate succession, that is, under English common law and customary law. This means that the court had to decide on a-case-by-case basis which of these legal systems to apply in a

given set of facts.[1] In cases where a Ghanaian dies intestate, the law governing the devolution of the estates is governed by the choice of law rules. The choice of law rules governing the intestate succession of Ghanaian estates were previously found in the *Court Act 1960*, later *Court Act 1971* and currently the *1993 Court Act.*[2]

Currently, the Court uses the *Court Act 1993*, which states the choice of law rules governing intestate succession in Ghana.[3]

> Subject to clause (2) of Article 11 of the Constitution, this Act and any other enactments, a Court when determining the law applicable to an issue arising out of a transaction or situation, shall be guided by the following rules in which references to the personal law of a person are references to the system of customary law to which that person is subject or to the common law where that person is not subject to a system of customary law.

Rule 1-

> An issue arising out of a transaction shall be determined according to the system of law intended by the parties to the transaction to govern the issue or the system of law which the parties may from the nature or form of the transaction be taken to have intended to govern the issue.[4]

Rule 2-

> In the absence of an intention to the contrary, the law applicable to an issue arising out of the devolution of a person's estates shall be the personal law of that person. 'Personal law' stated in this preamble is defined as the system of customary law to which the person is subject to.[5]

Rule 3-

> In the absence of an intention to the contrary, the law applicable to an issue as to title between persons who trace their claims from one person or group of persons or from different persons all having the same personal law shall be the personal law of that person or those persons.[6]

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[1] Isabel Moodley, *The Customary Law of Intestate Succession* (PhD Dissertation, University of South Africa,2012)164.
[2] Court Act 1960, Court Act 1971& Court Act 1993.
[3] 1993 Courts Act of Ghana, s 54.
[4] *Ibid* at rule 1.
[5] *Ibid* at rule 2.
[6] *Ibid* at rule 3.

Rule 4-

> In applying Rules 2 & 3 to disputes relating to titles to land due consideration shall be given to the overriding provisions of the law of the place in which the land is situated.[7]

Rule 5-

> Subject to Rules 1-4, the law applicable to an issue arising between two or more persons shall where they are subject to the same personal law, be that law, and where they are not subject to the same personal law, the Court shall apply the relevant rules of their different systems of personal law to achieve the results that conform with natural justice, equity, and good conscience.[8]

Rule 6-

> In determining an issue to which the preceding rules do not apply, the Court shall apply the principles of the common law, or customary law, that will do substantial justice between the parties, having regard to equity and good conscience.[9]

Rule 7-

> Subject to the directions that the Supreme Court may give in the exercise of its power in the determination of an issue arising from the common law or customary law, the Court may adopt, develop, and apply the remedies from a system of law, whether Ghanaian or non-Ghanaian that appear to the Court to be efficacious and meet the requirements of justice, equity, and good conscience. [10]

The *Court Act 1993* has shortcomings and, therefore, its rules should be reviewed and amended. First, the phrase "whose intention" in rule 2 is not defined or qualified, and it is therefore, unclear as to "whose intention" is relevant under the rule.[11] The same criticism applies to Rule 3. The phrase " whose intention" in Rule 3 is not clearly defined .[12] The Act further permits the courts to hypothesize, connect and enforce the "relevant rules" of the conflicting systems of personal law to

[7] *Ibid* at rule 4.
[8] *Ibid* at rule 5.
[9] *Ibid* at rule 6.
[10] *Ibid* at rule 7.
[11] Anthony Allott, "Court Act 1971" (1972) 16:1 J Afr L 59 at 61.
[12] *Ibid* at 61.

"achieve a result that conforms to natural justice, equity and good conscience".[13] This poses a big challenge for judges, particularly when the relevant rules of the conflicting systems express or display incompatible results or outcomes, which are by no means uncommon.[14] In addition to the choice of law rules, the type of marriage contracted informs the decision judges make in the devolution of intestate property.[15] I have already stated that under rule 2 of Section 54 of the *Court Act, 1993*, the law applicable to the distribution of the intestate property of a deceased Ghanaian is the personal law of the deceased.[16] However, in Ghana, parties can conclude customary marriages, namely marriages contracted according to the rules and tenets of ethnic groups or they may opt to enter English common law-type marriages referred to as a marriage ordinance. Where an ordinance marriage is concluded, the person who contracts this type of marriage chooses that succession to his property will be regulated by English law and not customary law.[17]

As such, agreeing with Bentsi-Enchill, I argue that "what we need in Ghana is not a set of rules for choosing between systems of law but a framework of guiding principles for progressively developing one system of law generally applicable to everybody."[18] The Ghanaian systems of law are capable of being harmonized and adapted to cope with present-day circumstances and it is time that a conscious attempt is made to do so.

5.3 Legal pluralism in Ghana: The Co-Existence of the English Common Law and Customary Laws.

[13] *Ibid* at 61.
[14] *Ibid* at 61.
[15] Moodley, *supra* note 1 at 169.
[16] *Ibid* at 169.
[17] *Ibid* at 169.
[18] Kwamena Bentsi-Echill, "Choice of Law Since 1960" (1971) 8:2 UGLJ 74.

Legal pluralism in Africa is generally recognized as the co-existence of international, state, customary, and religious laws within a population or social field.[19] Scholarly interest in the co-existence of normative orders in African social fields mainly centres on conflicts arising from the interaction of indigenous law with state law. Before delving into the Ghanaian case, it is worth mentioning the tension in the laws of other African states. This illustrates that legal pluralism is affecting most countries in Africa and a solution for the Ghanaian context can also set an example for other nations.[20] I will first start with Sudan, which is at the centre of legal crosscurrents. There is tension between Islamic law and customary laws. To a large extent, the tension between Sudan's Islamic law and customary laws reflects the uneasy relationship between the north and the south.[21] Nigeria also experiences conflicts between its English common law, customary laws, and Islamic law. [22]

Another country with a fascinating example of conflict of laws is Cameroon. Cameroon received and has adopted the French civil laws, Anglo common laws, and German civil codes, which are in conflict.[23] The problems regarding conflict of laws within the continent have led to several conferences including the London Conference on the Future of Law in Africa 1959-60, the Colloquium on African Law at the School of Oriental and African Studies in London in June 1963,

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[19] Antony Allott, "The Unification of Laws in Africa" (1986) 16:1/2 Amer J Comp L 51.
[20] *Ibid* at 52.
[21] See *Saoans Mahrous v Heirs of John Iskander* (1967) Sudan LJ7 & Rep 156 & *Mihran Bidjikan v Estate of Hagop Stephanian (*1967) Sudan LJ& Rep 70 are intestate succession cases where the court was faced with the challenge of deciding which law to apply.
[22]A loci classicus in elaborating the conflict of laws in Nigeria are *Cole v Cole (1898) 1 NLR 15 & Smith v Smith (1924) 5 NLR 105.* In these two cases, the court had to resolve the conflict between English law and customary law.
[23] A classic example of a case of conflict of laws in Cameroon is the *Estate of Sam Edward Charlie* (2002) HCF/AE/24/2001-2002 where the court had to resolve the conflict between the French civil code and the English common law. Other notable examples include *Baba Iyayi v Hadja* Arret No 083 of 32 March 2000, where the Yaoundé Court of Appeal upheld a decision of the Tribunal de Premier Degre which had distributed the property in accordance with Moslem law, against the contention of the eldest son that customary law should be applied to make him sole beneficiary and successor and in *Ndjobdi v Gabilla* civil suit No 3/2002-2003, the Ndop Alkali court upheld the Muslim law on the grounds that the "plaintiff is a Muslim by faith and tradition while the defendant is a non-Moslem" and "the properties claimed are the properties of a Muslim."

the Dar-es-Salaam Conference on Local Courts and Customary Law in Africa in 1963, the Ife University Conference at Ibadan in 1964, and finally, the Venice conference called "From a Traditional to a Modern Law in Africa."[24] The general conclusion of the London Conference on the Future of Laws in Africa, delivered by the Chairman, Lord Denning, was that "the uniformity of laws would undoubtedly make a valuable contribution to the administration of laws in Africa and is therefore desirable."[25] Similar proposals for a unified law were made in the Dar-es Salaam Conference. The conference proposed the need for customary laws to be unified and integrated with the main body of statutory laws.[26] Additionally, the conference noted the need to quickly train many judges for the local courts so they can be effectively integrated with the state courts. The conference stated that the unification of laws is also essential to cement a sense of nationhood.[27]

The Colloquium on African Law deliberated in detail on the legal status of women in Africa. The members of the conference proposed a unified law as the existing dualism between English law and customary laws leads to inconvenient or unjust results that affect women's rights.[28] The meeting at Venice was also put together by the Fondazone Giorgio Cini and Presence Africaine with the cooperation of UNESCO. The general theme of the conference was the shift from traditional to modern law. The meeting was attended by experts from African states, France, and Switzerland, who deliberated on the problems of African law and how to solve them.[29] Finally, the Ife University Conference under the direction of Dr. Allott was an outstanding success and marked

[24] *Ibid* at 67.
[25] Anthony N Allott, "What is to be Done with African Customary Law-The Experience of Problems and Reforms in Anglophone Africa from 1950" (1984) 28:1/2 J Afr. L 65.
[26] Yash Ghai, "African Conference on Local Courts and Customary Law: Record of the Proceedings of the Conference held in Dar es Salaam" (1964) 4:2 J Mod Afr. Stud 613-615.
[27] *Ibid* at 614.
[28] Anthony N Allott & J.S Read, "Colloquium on African Law, London" (1961) 5:3 J Afr. L 125-138.
[29] School of Oriental & African Studies, "Conferences on African Law" (1963) 7:3 J Afr. L 133-135.

a real development in the consideration of the subject of integration of laws. All these conferences advocated for the unification of laws in Africa as the conflict of laws leads to the most pressing legal and political problems within the continent. [30]

The conflict of laws prevalent in the legal system poses a challenge to the court in deciding which law to choose in intestate succession cases. This creates uncertainty within the Ghanaian legal system and entrenches the vulnerability of widows. There is a conflict of laws between the English common law and the diverse customary laws. For over a century, the court has been battling with the competing legal systems and the problems they pose in the interpretation of the law. For example, in the case of *Amerley v Otinkorang and Another*, the deceased, the late E.B Otinkorang, was a Ga Man who had lived in Teshie, a town in Accra, for many years.[31] He married according to the English law. After his death, there was a legal battle between the family of the deceased and his widow over his estates. The widow, the first respondent, was granted letters of administration from the high court to administer the estates of the deceased. The High Court dismissed the claim by the appellant for the possession of several houses, cash and other properties set out in the writ. The appellant appealed to the Court of Appeal, claiming that some of these properties belonged to the Atwei Otofoyo family which is the extended family of the deceased. The appellant claimed that the first respondent, the widow, wrongfully took possession of those properties. The first respondent denied that she was in possession of any properties which belonged to the appellant's family and claimed that all the properties of which she possessed were the self-acquired properties of her late husband. The court of appeal held that where a domiciled Ghanaian dies intestate,

[30] *Ibid* at 134.
[31] *Amerley v Otinkorang and Another* (1965) GLR 656.

succession to his property must be determined by his personal law and that English rules do not apply to the distribution of the estate of an intestate Ghanaian who dies in Ghana.[32]

In this case, the courts should have combined the principle under the English law where the wife of the deceased is given an equal share of intestate property and the customary law principle where the extended family is entitled to intestate properties. Human rights advocates complain that legal pluralism inherently compromises human rights, particularly those of women. Their concern is that it often perpetuates and strengthens traditional patriarchal regimes that systematically undervalue women's rights and interests. What is necessary and desirable is to have a deliberate goal, especially at the national level, to foster the eventual harmonization of the principles of English common law and statutes with those of locally enacted laws and a customary law to establish a general law for the whole country.[33]

Therefore, I propose an integration of the English common law and customary laws in Ghana. Integration in this case is the making of a new legal system by combining separate legal systems into a self-consistent whole. The legal systems thus combined may still retain a life of their own as sources of rules, but they cease to be self-sufficient autonomous systems.[34] This ensures a possible interaction and interdependence between state law and customary laws. Elias pointed out some advantages of a unified law. According to him, the unified law will be recognized and respected by the people as their own, nourished and nurtured on native soil, even though part of it has been imported from a foreign source.[35] Miranda Forsyth and other scholars, such as Woodman

[32] *Ibid.*
[33] *Ibid* at 59.
[34] Antony Allott, "Towards the Unification of Laws in Africa" (1965) 14:2 Int'l & Comp L Q 377.
[35] Elias O Tsalim, *British Colonial Law: A Comparative Study of the Interaction between English Law and Local Laws in British Dependencies* (London: Stevens & Sons Limited,1962)323.

and Morse, also proposed that an interaction between customary law and statutory law would ensure a cross-fertilization of ideas and procedures between these two normative orders.[36] This integrated approach will address the dilemma that judges face when interpretating the law and consequently address the discrimination women face in accessing their inheritance rights.

I highlight schemes through which these two normative orders can be effectively reconciled to create the unified law in Ghana.

(I) Technicalities of the English Law

First, to attain an integrated legal system, the received English law should be simplified in several ways to make easy the work of its integration with customary law and social patterns of the local community.[37] There are several peculiarities and technicalities of the English law that must be watered down or, in some cases, cut out for it to be received into the local mores and ethos of the people of Ghana. According to Lord Justice Denning:

> The common law cannot be applied in a foreign land without considerable qualification. Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character that it has in England. It will flourish but it needs careful tending. So, with the common law. It has many principles of manifest, justice, and good sense which can be applied with advantages to peoples of every race and color all the world over; but it has also many refinements, subtleties, and technicalities which are not suited to other folks. These off-shoots must be cut away. In these far-off lands, the people must have a law that they understand and which they will respect. The common law cannot fulfill this role except with considerable qualifications.[38]

Law reformers must address the language, complexities, and procedures of the English common law. The language of proceedings is complex, tends to be technical English, and cannot be

[36]Bradford W Morse & Gordon R Woodman*, Indigenous Law, and the State* (Dordrecht, Holland: Foris publishers,1988).
[37] Tsalim, *supra* note 35 at 287.
[38] *Ibid* at 287.

understood by most Ghanaians.[39] The procedures of English law are complex, cumbersome, and bureaucratic as compared to the procedures of customary law. If English law is to harmonize with customary law, the language of proceedings must be simple and clear. This will enable the traditional courts presided by chiefs, who are most often uneducated through formal education to understand the procedures and language of the English common law.[40] If the chiefs can infuse principles of equality embedded in English law, the law must be comprehensible. In addition to these traditional rulers, most women also prefer the traditional courts to the formal court as the proceedings and procedures are simple and clear. "The formal court system is like a spectator sport. It is like a theatre, but most people do not understand what is going on. The formal system is more British in Ghana than it is in Britain, and everything is coded. It has authority but it is an authority that most people do not understand."[41] For more Ghanaian women to patronize the proposed unified law, there is a need for the formal court rules and processes to be reduced to clear and simple terms.

(II) WRITTEN CUSTOMARY LAW

For an effective interaction between both normative orders, customary law must be reduced to a clear and standard form.[42] Dealing with the effects of the oral nature of customary law is imperative for a unified law. African states should consider the unification of customary law as depending on a prior ascertainment and restatement of their existing customary legal systems. Most African governments believe it is impossible or at least highly risky and unscientific to try to unify diverse

[39] Kane Minneh, Joseph Oloka-Onyango & Abdul Tejan-Cole, Reassessing Customary Law Systems as a Vehicle for Providing Equitable Access to Justice for the Poor (Arusha Conference: New Frontiers of Social Policy, (2005)10.
[40] *Ibid* at 10.
[41] Chi Mgbako & Kristina Scurry Baehr, "Engaging Legal Dualism" in Fenrich et al, eds, *The Future of African Customary Law (*Cambridge UK: Cambridge University press,2011) 174.
[42]*Ibid* at 169.

legal systems without knowing what each of those systems is or contains. However, the unification of customary law is regarded as the first step on the road to the development of a unified law. In Ghana, the onus lies on experts such as judges and state institutions such as the Law Reform Commission, and the National House of Chiefs to compile existing customary laws. The Law Reform Commission of Ghana was established in 1968 to reform Ghana's laws.[43] The Commission receives, considers, and makes proposals for the initiation and reform of any law in the country. The Commission makes practical proposals for the development, simplification, and modernization of the law.[44] It also gives suggestions to the Supervisory Minister of State on policies for law reform. Additionally, the Commission also embarks on a scrutiny of particular areas of the law and prepares proposals for reform after appropriate research. Finally, it acquires information on the legal systems of other countries that may promote the performance of its functions.[45] The Commission also makes the important issues regarding law reform known to the public.

The National House of Chiefs has a constitutional mandate to codify customary law according to Article 272(b) of the Constitution. That is, "undertaking the progressive study, interpretation, and codification of customary law with a view to evolving, in appropriate cases, a unified system of rules of customary law, and compiling the customary laws and lines of succession applicable to each stool or skin."[46] I highlight codification, special social or anthropological studies, and lastly the restatement of law approach for carrying out this integration process.[47] It is encouraging that the National House of Chiefs embrace the mandate in Article 272(b) of the Constitution. The

[43] Law Reform Commission Act,2011 (ACT 822), s(3)(a).
[44] *Ibid* at s (3)(c).
[45] *Ibid* at s(3)(d).
[46]Constitution of Ghana*,* art 272(b).
[47]Tsalim*, supra* note 35 at 288.

National House of Chiefs began the Ascertainment and Codification of the Customary Law Project (ACLP) in 2007 which I elaborate upon later in this chapter. This was an initiative to compile the customary laws in Ghana into a unified system of rules of customary laws.

While the translation of customary law into writing is a necessary starting point for the effective interaction between normative orders, ultimately, I recommend the restatement of law approach for Ghana. The codification approach on its own introduces rigidity into the customary law system which is a flexible system. Customary law will be ossified when put into codes and would not reflect the changing needs of social and economic development.[48] This will hinder the promotion of equality within the inheritance system as current developments with regards to women's contribution towards the acquisition and maintenance of matrimonial property will not be considered and recognised. Therefore, I propose the restatement of law approach as the restatement of law is not reduced into codes, allowing for flexibility, certainty, and objectivity.[49] Additionally, the restatement of law is a well-used source of secondary authority that is highly persuasive.[50] This is because it is a comprehensive statement of customary law with extensive input from judges, practicing attorneys, and law professors. Compared to the principles and general principles of law, the rules of a restatement are usually more comprehensive so that judges can apply them as rules.[51] Restatements of law are not legally binding on the courts. However, the courts may decide to adopt

[48] Elias Olawale, "The Problem of Reducing Customary Laws to Writing" in Alison Dundes Renteln & Alan Dundes, eds, *Falk Law Essays in Theory and Practice of Lex Non Scripta,* (London: Routledge Press,1994) 319-330.; see also Simon Roberts, "The Recording of Customary Law: Some Problems of Methods" (1971) 3 Botswana Notes & Records 12-21.

[49] Azinge Epiphany, "Codification of Customary Law: A Mission Impossible"? in: Y Osinbajo & Kalu AU, eds, *Towards a Restatement of Customary Law* (Lagos: Federal Ministry of Justice,1991) 289.

[50] Institute of African Studies & University of Ife, *Integration of Customary and Modern Legal Systems in Africa* (New York: Africana Publishing Corporation, 1971).

[51] Ralf Michaels, *Restatements* (Oxford: Oxford University Press,2011) 1.

or cite restatement provisions as law. Therefore, making that restatement of law a mandatory authority.[52]

The restatement of law approach has worked successfully in common-law systems such as the English system. The Restatement of law in the English system provides accessibility, making the law more inclined to rational discussion and consistency.[53] This makes the English law more likely to be applied by lawyers. Scholars and practitioners have systematised the English law in a new more accessible form, focusing on its most important principles. Restatements in the English system addresses broad areas of law such as contract, tort, and restitution.[54]

(A) CODIFICATION OF CUSTOMARY LAW

One attractive remedy to the problem of the ascertainment and unification of customary law is that of a written code. It will be important to trace the codification of customary law back to history. The first attempt to codify customary law from the center was made in Natal. The Natal Code of Native law was put together and issued in 1875-1878 and 1891 respectively and was reviewed in 1932.[55] A more general deliberation of codification arose after the circulation of the Natal Code in 1946-7. Even though this was a good attempt, the code could not be made comprehensive and exclusive. There remain aspects of the customary law that have not been codified and must be proved with evidence to the satisfaction of the court. Parties can present evidence to supplement but not to go contrary to the provisions of the code.[56]

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[52] Legal Information Institute, Restatement of the Law (New York, 2020); <http://www.law.cornell.edu/wex/restatement_of the law >.
[53] Paula Giliker, "Codification, Consolidation, Restatement? How Best to Systemise the Modern Law of Tort" (2021) 70 ICLQ 271-305.
[54] *Ibid* at 300.
[55] Allot, "Towards the Unification of Laws in Africa", *supra* note 35 at 366.
[56] *Ibid* at 389.

Sometimes, codification of the law was also recognized as a means of protecting a legal system against invasion by a foreign system. The Civil Codes of Quebec and Louisiana are examples whereby the local French law was protected in the face of invasion by the common law.[57] A popular example of codification, for this reason, happened in Madagascar during the 19th century. The reign of Queen Ranavalona II (1868-83) was one of general reforms. Her husband, who was also the prime minister recognized the need to develop Merina control over the island to prevent increasing French and British influence.[58] In 1868, the Code of 101 Articles was enacted, ensuring among other things, religious freedom and preventing the sale of land to foreigners. In 1869, the Queen and her Prime Minister were converted to Christianity, which was then accepted as the state religion. The influence of the missionaries who had achieved this conversion naturally increased. The French were not pleased and therefore decided to consider annexation. The need to empower the state became obvious and led to the Code of 305 Articles in 1881.[59]

In 1960, a codification project was also carried out in Ethiopia. In 1954, long before Europe's African colonies began to attain independence, the emperor appointed a commission of foreign experts to draft codes for his country. [60] In 1955, he gave Ethiopia a very progressive Constitution, which was drafted by American lawyers, and which contained a Bill of Rights incorporating most of the United Nations Declaration of Human Rights. The task of drafting the Civil Code was assigned to Professor Rene David, from Paris, the outstanding French jurist. In 1957, parts of the draft (those relating to Ownership, Contracts, Unjust Enrichment, and Delicts or Torts, called in

[57] N.W Hoyles, "Civil Code of the Province of Quebec" (1904) Can L. Times 113.
[58] *Ibid* at 114.
[59] *Ibid* at 114.
[60] Haile Gabriel G Feyissa, *The Ethiopian Civil Code Project: Reading a "Landmark Legal Transfer Case Differently"* (PhD Dissertation, University of Melbourne,2017) 272.

the English version "offenses") were translated into English from the original French and made available to law students at Addis Ababa University College.[61] The draft was completed by Professor David, submitted to the Ethiopian Parliament, duly passed, and officially promulgated by the emperor on May 5, 1960, effective September 11, 1960, the New Year's Day of Ethiopia. Copies of the final form of the English version have recently been made available and printed as an official publication of the Ethiopian government. The official language of Ethiopia is Amharic.[62] The original French draft of Professor David is also available but is not readily procurable yet. Unfortunately, the English translation is often obscure, as indeed most translations are. Even the Swiss have quite often discovered variances between the French, German, and Italian versions of their enactments. The final form of the English translation varies very little from the one furnished in 1957 in Asmara. [63]

However, Antony Allott, known for his involvement in the restatement of customary law projects in former British colonies in Africa, predicted that the Civil Code "cannot work even in the long run for it lacks a measure of popular understanding and acceptance".[64] Developments in the 1970s emboldened his critique of the "programmatic," "elitist," and "neo-capitalist" Code, which, he also claimed, was a purposive attempt by late imperial Ethiopia at social transformation through legal transfer. Writing after the fall of Haile Selassie's regime in 1974, Allott described Ethiopia's two decades of experience with the Code as a unique case of a failed exercise in the unification of laws using a "translocated" legal code:

> The Ethiopian Civil Code may be described as the comparatists' joy. As an intellectual achievement [it] ranks high. As a practical exercise, it was a dismal failure. The law was

[61] *Ibid* at 99.
[62] *Ibid* at 101.
[63] *Ibid* at 101.
[64] Allot, "Towards the Unification of Laws in Africa", *supra* note 34 at 366.

> programmatic in the most distant sense, in that it set a program to which the nation and its disparate parts might eventually work, and which might eventually succeed. The comparatists' joy is the practitioner's nightmare: it is too much to expect the fledgling or even the established Ethiopian legal practitioner to be able to handle material from so many different sources. The judges of the courts which should be applying the Code have not resorted to it. Worst of all, the population at large has been unaffected by the Code in part due to the high rate of illiteracy. Ethiopia is merely a special and extreme case of a general problem. How the problem compounded by politics is attested by the vicissitudes of the country since the fall of the emperor in 1974, and the seizure of power by a revolutionary socialist regime.[65]

This indicates that some states have unified their customary laws through codes. However, scholars have asserted that the codification process will not work in the modern era in developing African states due to several factors. First, it is cautioned that codification may result in a wrong deduction of principles given the process of rationalizing numerous rules and the difficulty of capturing the processes of customary law, leading to judicial customary law.[66] It is also contended that in a multi-ethnic state like Ghana with a huge number of customary laws, codification will be a difficult process.[67] Also, customary law is flexible and constantly changing. The codification of customary law may lead to its ossification at an early stage and will prevent its future development, in fact, "creating a roadblock to modernity."[68] In addition, due to the flexibility and generality of rules of customary law, the drafter of the code will face a great challenge in selecting the rules to be replicated in the code and in expressing them with the sensitivity important to reflect exactly how they function. In recent times, it has been accepted that a comprehensive knowledge of the

[65] *Ibid* at 389.
[66]Enyinna S Nwauche, "The Constitutional Challenge of the Integration and Interaction of Customary and Received English Common Law in Nigeria and Ghana" (2010) 25 Tul Eur & Civ LF 37; see also Janine Ubink, "The Quest for Customary Law in African State Courts" in Jean Marie et al, eds, *The Future of African Customary Law* (Cambridge University Press,2011) 95.
[67]*Ibid* at 95.
[68]Tsalim, *supra* note 35 at 275.

environment in which the law operates must precede any attempt to describe the rules of customary law.[69]

Even in circumstances where the experts responsible for the codification project are prepared in this regard, the best way to obtain the relevant information concerning customary law presents challenges. Deliberation with tribal authorities is one method, and another way is by close observations through trials (case study approach).[70] Whichever of the two methods used in the codification approach contains the difficulty of distinguishing the legal from the non-legal rules and the challenge of differentiating the enduring rule from the excursion of the particular case.[71] The recognized flexibility with which the tribal court will apply rules of customary law indicates the complexity in ascertaining the precise rule in issue. There is little assurance that the application of a rule in one case will be replicated in a later case based on similar facts. If the code is to be of any importance to the courts, the rules it establishes must be of clarity and precision.[72] A code of customary law will likely distort rules of customary law or will establish such general rules as to be little more than a compilation of truisms. In each of these cases, the code will be of minimal assistance to the public or the practitioners. Another challenge faced by African countries with codes is the difficulty of deciding which system of customary law to elevate to the favored position of the code.[73] Even if one system of customary law is selected for codification, this does not suggest that differences in that system will be erased. Even though the system will show common characteristics, it will also exhibit local diversity.

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[69] *Ibid* at 278.
[70] Allott, "Unification of Laws in Africa", *supra* note 19 at 66.
[71] *Ibid* at 66.
[72] *Ibid* at 66.
[73] *Ibid* at 66.

Additionally, there is a danger that in establishing a general code, the specific rules of an outstanding tribe may be implemented on other tribes and that the variations adopted by lesser tribes may not be considered. For example, in Ghana, Akans are the dominant ethnic group.[74] The unification of customary law may become an "Akanization" of customary laws since the laws in the less developed parts of the country, especially in the far north, will be forced into the patterns of Akan customary law in the more active and developed parts of the south.[75] Also, in situations where judges belong to the dominant ethnic group, they will often exert pressure on laws to which they are not accustomed to bring them in line with customary laws they are familiar with.[76] It may not be prudent to consider every minor variation, but "if you make any drastic change without consulting the councillors or the wise men of the tribes it would simply be inoperative" because if the people choose to approve of the code, they will keep out of the court and the law cannot be implemented.[77] On the contrary, if the code is too comprehensive, it tends to introduce too great a rigidity into what is otherwise a flexible system.[78] The codification process has many challenges. As such, several scholars have suggested that the codification of customary law is not suitable for fast-developing African countries, such as Ghana.[79]

Ghana attempted the ascertainment and codification of the Customary Law Project (ACLP) in 2007. The project was a pilot study undertaken by the National House of Chiefs in collaboration with the Law Reform Commission under the leadership of Professor Justice Kodzo Parku Kludze

[74] *Ibid* at 69.
[75] *Ibid* at 69.
[76] *Ibid* at 69.
[77] *Ibid* at 69.
[78] *Ibid* at 69.
[79]Bret L Shadle, "Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya" "1930-160" (1999) 40:35 Afri Hist 421.

in 20 traditional areas.[80] The project was funded by the German Technical Co-operation (GTZ). This is in accordance with the constitutional mandate of the National House of Chiefs to "undertake the progressive study, interpretation, and codification of customary law" and to assess "traditional customs and usages to eliminating those customs and usages that are outmoded and socially harmful."[81] The project aimed to cover two main areas of customary law: family and customary land laws. The advantages anticipated for the codification project included not only a documentation of customary law for use by the judiciary, academic institutions, communities, and individuals but also the institutionalization of a reference point for customary law issues. This will in effect strengthen the Ghanaian legal system in terms of fixation, accuracy, and predictability.[82]

The first phase of the project was undertaken on a pilot basis from 2007 to 2011. Two traditional areas from each of the 10 administrative regions of Ghana were selected for the project. Researchers were trained to ascertain and collect data on land and family law from these communities after which the data were validated at workshops held in these communities.[83] The plan for the second phase was the collection of data from about 30 traditional areas. The last stage entailed deliberations with traditional leaders of areas not involved in the first and second phases. Leaders of traditional areas were to review the ascertained law and identify variations from their communities after which there will be a final validation.[84] The ACLP Secretariat stated that after the chiefs have validated the ascertained law, there will be a codification and final declaration of the customary laws. It was expected that some of the rules of customary law may be considered

[80] Joseph B Akamba &Isidore KwadwoTufuor, "The Future of Customary Law in Ghana" in Jean Marie Fenrich et al, eds, *The Future of African Customary Law* (Cambridge: Cambridge University Press,2011) 222.
[81] *Ibid* at 200.
[82] *Ibid* at 200.
[83] *Ibid* at 200.
[84] *Ibid* at 200.

by the National House of Chiefs and assimilated into Ghanaian law. The ascertained laws were supposed to meet a particular standard before they can be assimilated into the laws of Ghana.[85] The rules approved by the National House of Chiefs shall be submitted to the minister of state who after deliberations with the Attorney General may make a legislative instrument giving effect to the suggestions of the National House of Chiefs.[86] The first phase of the project was completed and the documented customary laws were circulated among institutions, including the Law Reform Commission, Judicial Service, 10 regional houses of chiefs, and the National House of Chiefs.[87] However, the second phase is still pending as there is no funding to complete the project. The secretariat of the Ascertainment and Codification of Customary Law Project has submitted a proposal to the National House Chiefs to help solicit funds for the second phase of the project. However, the National House of Chiefs has not pushed the proposal forward.[88] It is a decade now, and the codification of the customary law project has not been completed. The ACLP Secretariat wrote a detailed proposal on how to obtain funds to continue the project and submitted it to the House of Chiefs. However, the House of Chiefs have not pushed the proposal further.[89]

(B) SPECIAL SOCIAL/ANTHROPOLOGICAL STUDIES

The special social or anthropological study is also another approach that can be used to reduce customary law into a standard form. Anthropology is the scientific study of humanity concerning human behavior, human biology, cultures, and societies in both the present and past, including past human species. Fieldwork is one of the fundamental methods used in anthropological

[85] Ama Hammond, "*Towards an Inclusive Vision of Law Reform and Legal Pluralism in Ghana"* (PhD Dissertation, University of British Colombia,2016) 165.
[86] *Ibid a*t 161.
[87] Interview with a representative of the National House of Chiefs, Kumasi-Ghana.
[88] *Ibid.*
[89] *Ibid.*

research.[90] It entails a range of well-defined processes, including informal interviews, direct observation, participation in the life of a group, and collective discussions. Traditional participant observation is normally undertaken over a long period, varying from several months to many years and even generations. If the researcher can spend more time observing the population under study, they can gather more comprehensive and accurate information about the individuals and the community at large.[91] An extended period of observation can also reveal hidden details, and the researcher can discover differences between what participants say and what happens. In most situations, the quality of results obtained is based on the data gathered in the field. This means that the researcher should be highly involved in the research and exhibit an ability to observe things that other individuals visiting the area of study may fail to notice.[92] The more aware researchers are of new ideas, concepts that they may not have seen in their own culture, the better will be the absorption of those ideas.[93] A good understanding of such materials means a better understanding of the cultural forces operating in the area and how they affect the lives of the population under study. Anthropologists have often been taught to avoid ethnocentrism when conducting any form of field research. During the observation period, the researcher engages in interviews with the people under study. Interviews can be structured or unstructured interviews. In structured interviews, the researcher ensures that all respondents answer the same questions in the same order.[94]

However, the special social anthropological approach also has several setbacks, which makes it unsuitable for Ghana. First, in the process of collecting data, the investigator will often come up

[90] Tsalim, *supra* note 35 at 275.
[91] *Ibid* at 275.
[92] *Ibid* at 275.
[93] *Ibid* at 275.
[94] *Ibid* at 275.

against conflicting versions of the customary law of a given community, whether these are contained in court records or given by informants.[95] For example, there can be conflicting opinions between the older and younger members of the same community. The older members are normally conservatives, and the younger ones are, in most cases, agitated by the age-old customs.[96] Therefore, the investigator will be in a dilemma and must mediate between any two or more views of what the customary law on certain disputed issues may be.

Second, the investigator might decide to obtain information through the distribution of questionnaires among a large and miscellaneous body of people selected at random. The questions must be concise, straightforward, and direct, not requiring clarification.[97] However, it must be noted that not all answers to the questionnaire would be satisfactory. In cases where the answers are sufficiently large and careful, it would still be unscientific to build a coherent body of principles from them alone.[98] However good the answers to the questionnaires might be, there can be no doubt that they would still have to be supplemented by information gathered from other sources.[99] The questionnaires returned by the respondents may not constitute a random sampling of those sent out. In some instances, respondents may not return questionnaires or return them with some questions unanswered, which may decrease the validity of the gathered data. Respondents can also give inaccurate replies leading to unreliable data.[100]

Additionally, the questionnaire or instructions to the respondents may suggest the answers preferred by the investigator. As a result, respondents may modify their answers to give the

[95] *Ibid* at 278.
[96] *Ibid* at 278.
[97] *Ibid* at 278.
[98] *Ibid* at 278.
[99] *Ibid* at 278.
[100] Marjorie Philips, "Problems of Questionnaire Investigation" (2013) 12:3 Research Quarterly, American Association for Health, Physical Education & Recreation 528-537.

investigator what he wants, leading to unreliable data.[101] The investigator from the beginning of the research may be faced with the challenge of differentiating between law and custom, which is a difficult task. However, the researcher must note that there is a clear differentiation to be made between law and custom.[102] Existing native court records might be consulted in cases of doubt or difficulty, always subject, of course, to scrupulous observance of the law of averages.[103] But when such records do not cover the points at issue, one helpful but by no means conclusive test would be to ask whether the alleged practice is law, which the native courts would implement, or custom, which they would not. Perhaps, it is better to say that it all depends upon whether the practice in issue is recognized by the majority of the local community as binding on all the people, or whether it is merely conventional or permissive. It is law only in the former case.[104]

Another shortcoming of this approach that should be avoided is to expect that a community with an evidently homogeneous body of customary law has a uniform set of rules regulating all its members without exception.[105] While the idea is to foster this rationale as much as circumstances allow, the first priority is to realize that customary law may differ from place to place within the same territory and, accordingly, to watch and record the discernible law regions. Such recognition of possible divergencies might often help in the ultimate promotion of uniformity.[106] The general, as well as the particular principles of even a homogenous body of customary law, must be recorded to obtain a true picture of the whole legal community.

[101] Tsalim, *supra* note 35 at 278.
[102] *Ibid* at 278.
[103] *Ibid* at 278.
[104] *Ibid* at 278.
[105] *Ibid* at 278.
[106] *Ibid* at 278.

Finally, in Ghana, chiefs have the power to declare what they consider to be customary law within the areas of their jurisdiction. The challenge here is two-fold.[107] First, in several cases, these chiefs simultaneously exercise executive and judicial functions, and it may usually be difficult to know whether the law they declare is *de lege lata*- "the law as it is" or *de lege ferenda*- "what the law should be". Second, as chiefs, they may tend to be behind the modern legal thought and practice of their community. With a few important exceptions, they are the least competent to make an effectual combination of the old and the new rules of conduct in a fast-changing social and economic scene.[108] Also, many native or local authorities now consist of traditional or hereditary elements, as well as a growing proportion of elected ones, and the general problem of putting together these two groups into a harmonious body of administrators has yet to be solved. The power of chiefs to state customary law results in the danger that there will be several divergencies in an otherwise homogenous legal community.[109] It is appropriately feared that an investigator might not obtain much real profit from using the declarations of native authorities as a source of customary law. Therefore, the investigator's objective of seeking uniformity of customary laws would be difficult to achieve.[110]

I argue that the codification and the anthropology surveys will not be suitable for the Ghanaian context. The local people in Ghana are unwilling to be used as objects of research. Therefore, the disciplinary legitimacy of anthropology remains questionable among the people. As such, I propose the restatement of law approach.

[107] *Ibid* at 278.
[108] *Ibid* at 278.
[109] *Ibid* at 278.
[110] *Ibid* at 278.

(C) RESTATEMENT OF LAW APPROACH

The fourth approach for the unification of customary law is the restatement of law approach. The restatements of law are a set of laws that brief judges and the lawyers about the general principles of common law.[111] The restatement of law started as an idea for a small project of the American Law Institute dedicated only to the topic of confidentiality. Hazard, the then executive director of the Institute, initially suggested a "mini-restatement" that would only focus on confidentiality in the practice of law.[112] After that period, the restatement of law project has grown in magnitude with recommendations from the Institute's programs committee, the group that establishes and reviews suggestions for new institute projects. The restatement of law project expanded to include several subjects including contracts, conflict of laws, torts, property, trust, agency, and business associations.[113] The Restatement of law was initiated to assist the judiciary understand and interpret the existing common law. The restatements of law are persuasive and cited by the courts.[114]

Courts, lawyers, and legal scholars in English-speaking Africa have had to rely mainly on evidence provided by chiefs and elders, the writings of social anthropologists, and the patchy reports of judicial proceedings for their information about African customary laws.[115] There are few comprehensive analyses by lawyers in the legal language of the customary laws that could be used either by the courts or by legal scholars. Aware of these needs, and the demands for action made both by governments and scholarly conferences, the London School of Oriental and African Studies initiated its Restatement Project.[116]

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[111] Charles W Wolfram, "The Concept of a Restatement of the Law Governing Lawyers" (1987) 1:195 Geo. J. Legal Ethics 199.
[112] *Ibid* at 200.
[113] Charles E Clark, "The Restatement of the Law of Contracts" (1933) 13:5 Yale L.J.647.
[114] *West v Caterpillar Tractor Co. Inc* (1976) 336 So.2d 80.
[115] Ubink, *supra* note 66 at 87.
[116] *Ibid* at 87.

Through its research officers, and other scholars working in conjunction with the project, the systematic examination of existing materials on African customary law, and field investigations in several areas, such as Sierra Leone, Nigeria, Cameroon, Kenya, Tanzania, Zambia, Malawi, Botswana, and Swaziland, were set in motion.[117] Where possible, the project has worked with and through the governments of the countries concerned. Further, several official restatement schemes have been undertaken by African governments in conjunction with the project and under the supervision of officers seconded from it or trained by it.[118] The project has been collecting specific rules of customary law (persons, family, marriage and divorce, property, and succession) in different countries and assembling them in a form similar to restatements of the American Law Institute. The aim of the project is for African governments to have a unified system of law once they have a written form of their customary laws.[119]

I propose the restatement of law approach over the codification and anthropology approach for the Ghanaian context as it is a well-used source of secondary authority that is highly persuasive.[120] This is because it is a comprehensive statement of customary law with extensive input from judges, practicing attorneys, and law professors. Also, when a judge considers a restatement section in a legal brief, it allows the court to make an informed decision as to how to apply it to the case at hand. This is because these restatements accurately restate the already established law.[121] Restatement of law may be in the form of guidelines and manuals made up of recordings of

[117] Eugene Cotran, *Restatement of African Law: The Law of Succession*, vol 2, Kenya II (London: Sweet & Maxwell, 1969); see also J.O Ibik, *Restatement of African Law: The Law of Land, Succession, Movable Property Agreements &Civil Wrongs*, vol 4, Malawi II (London: Sweet &Maxwell, 1971); Simon Roberts, *Restatements of African Law: Tswana Family Law*, vol 5, Botswana 1(London: Sweet& Maxwell, 1972).
[118] Institute of African Studies &University of Ife, *Integration of Customary and Modern Legal Systems in Africa* (New York: Africana Publishing Corporation, 1971) 461.
[119] *Ibid* at 58.
[120] *Ibid* at 58.
[121] *Ibid* at 58.

customary laws. This means customary law is not reduced into codes, allowing for flexibility, certainty, and objectivity.[122] Due to its flexibility, the restatement of law approach will capture the social soul of customary law in Ghana. Judges will apply customary law which reflects contemporary socio-economic changes and the underlying principles of customary law.

Without a written form of customary law, it is easy to understand why the process of constituting a national common law in Ghana is not considered important or ongoing.[123] Even if it is not for the process of a unified law, customary law needs to be reduced to writing in the form of restatement manuals for many reasons, including an important one of making customary law a matter of law and not a matter of fact.[124]

Like other African countries, Ghana was also considered in the restatement of the African law project. Contrary to the other countries where the researchers gave a comprehensive statement of the diverse customary law of succession in their countries, Kludze, the Ghanaian researcher, focused on only one ethnic group in Ghana. Kludze's work focuses on the Ewe people of Ghana.[125] According to him, he chose this group because little had been written about this patrilineal group. There is no doubt that Kludze's work is well-written. The legal information is set out in context through introductory chapters on the history of the Ewe people, residential patterns, their political organization, and support groups.[126] However, Kludze's work has several limitations. First, Kludze's work is devoted to a single ethnic group without considering other groups in Ghana.[127] Since there are over a hundred ethnic groups in Ghana, the author's focus on one ethnic group is a

[122] Azinge Epiphany, "Codification of Customary Law: A Mission Impossible"? In: Y Osinbajo & Kalu AU, *Towards a Restatement of Customary Law* (Lagos: Federal Ministry of Justice,1991) 289.
[123]Nwauche*, supra* note 66 at 62.
[124]*Ibid* at 62.
[125] Anselmus Kodzo Paoku Kludze, *Ewe Law of Property*, Vol 6 (London: Sweet and Maxwell,1973) 324.
[126] *Ibid* at 300.
[127] *Ibid* at 300.

flaw to the whole restatement of law project. If Ghana needs a unified law, there is a need for a comprehensive statement on at least the major customary laws practiced among the diverse ethnic groups.[128] The judiciary decides on succession cases involving diverse customary laws, not only the Ewe ethnic group. As such, thorough research on customary laws in Ghana will assist judges in determining the content of customary law.

Additionally, Kludze provided very little information about how he carried out the research beyond the fact that he read "as many old Native Court decisions as possible" and "relied on decisions of the superior courts."[129] Kludze also mentioned that a substantial part of his work was derived "from field research among the Northern Ewe of Ghana."[130] He hinted at how he carried out his investigations in the preface of his book, where he thanks " all the chiefs, elders, dignitaries and ordinary individuals who volunteered information to him."[131] This indicates that his research plan was to speak to informants, but we were not told what form these discussions took or what kind of information he decided to obtain during his conversations with the informants. He also gave no information as to whether he used a participant observation approach, observing the day-to-day activities of the Ewe people.[132] Currently, establishing a clear methodology and differentiating between the various sources and the different ways in which they may be employed is imperative, yet surprisingly, Kludze gave little information about this in his research.[133]

[128] *Ibid* at 300.
[129] *Ibid at 300.*
[130] *Ibid* at 300.
[131] *Ibid* at 318.
[132] *Ibid* at 318.
[133] *Ibid* at 318.

Another limitation of Kludze's work is regarding the categories that he used in writing up his research. A larger part of his work is focused on the description of the ways in which property is distributed within Ewe social groups. In addressing this topic, he drew a distinction that he obtained from the jurisprudence of common law and civil law systems- between cases that deal with the distribution of property after death and those that occur in other situations. This distinction is firmly maintained, and a separate chapter focuses on the distribution of property after death under the title "Succession to property."[134] The Ewe material has been artificially incorporated into these preconceived categories. From his description, it is also obvious that there are other instances when the property is distributed besides after death. However, Kudze's fragmented treatment of these diverse elements hides the processual features of Ewe property distribution and fails to connect the processes of property distribution with the diverse stages in the developmental cycle of Ewe social groupings.[135] How Kludze made his distinction makes it difficult for the reader to get a clear picture of the relative significance of the various instances of the devolution process. For instance, according to the Ewe culture, the deceased may give out some of his estates as gifts which must comply with specific formal requirements. However, Kludze provided little information about the number of properties that devolve in this manner. This is a serious omission in his work.[136]

Ghana needs a restatement of law that captures its diverse customary laws. My research will therefore explore in chapter 6 how the restatement of law approach has worked and evolved in some African countries, such as Kenya, Malawi, Botswana, and Swaziland, which have a comprehensive statement of customary law. Ghana can imitate these countries and build on the

[134] *Ibid* at 318.
[135] *Ibid* at 318.
[136] *Ibid* at 318.

research of Kludze to provide a unified customary law that can be integrated into the common law.[137]

(III) THE INTERACTION BETWEEN THE FORMAL AND TRADITIONAL COURTS

The third scheme to attain effective interaction between the common law and customary law is the interaction of the formal courts with the traditional courts. The traditional courts operate in parallel to the formal administrative court system.[138] The interaction between the traditional and formal courts will lead to the exchange of ideas and legal procedures that will promote equality in the inheritance system.

I will begin with the customary law courts that is headed by chiefs and elders. Most of these chiefs and elders are ignorant of the English common Law. In Ghana, a general observation is that local courts offer an affordable and accessible forum of first resort for the vindication of claims.[139] Formal legal enforcement is an option only in theory for most women, especially those in the rural areas, on account of financial cost and restricted access.[140] Additionally, women prefer traditional courts as procedures are simple, flexible, and user-friendly and, as such, increase popular participation and legitimacy.[141] Finally, customary courts administer their proceedings in the local language of the parties, facilitating access and preventing translation errors.[142]

In customary courts, the chiefs administer customary law and sit as customary arbitrators in the resolution of disputes including that of intestate succession. Therefore, in the application of

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[137] *Esther Kudzordzie v Major Nelson Agbeko* (2010) JELR 69580 (HC).
[138] Leigh T Toomey, "A Delicate Balance: Building Complementary Customary and State Legal Systems" (2010) 3:1 The Law & Development Review 156-207.
[139] Victor Gedzi, "PNDC Law 111 in Ghana and International Human Rights Law" (2014) 2:2 Global Journal of Politics and Law Research 15.
[140] *Ibid* at 16.
[141] Digby Sqhelo Koyana, "Traditional Courts in South Africa in the 21st Century" in Jean Marie Fenrich et al, eds, *The Future of African Customary Law* (Cambridge: Cambridge University Press,2011) 231.
[142] *Ibid* at 200.

customary law of succession, chiefs must infuse their decisions with principles of equality.[143] This will ensure women as well as the extended family of the deceased get an equal share of matrimonial property.

In my opinion with proper guidance, education, and supervision, these traditional authorities will apply the principles of equality and non-discrimination in their adjudication of the customary law of succession.[144] Chiefs are not formally educated; therefore, it demands that lawyers from the state court break down the principles of equality in the common law to their understanding. Emphasis should be placed on the importance of equally sharing properties between the wife and the extended family to prevent the wife and children from becoming homeless and destitute. The education of the chiefs on the principles of equality should be practical so that it does not seem like an imposition or a means to alter customary laws.

Before delving into how these two parallel jurisdictions can interact, I will highlight a few criticisms of the traditional courts that hinder women from claiming a fair share of their inheritance rights. These highlighted criticisms indicate the need for interaction with the formal courts.

The first critique deals with the composition of traditional courts. Traditional courts are headed and presided over by chiefs and often aided by a group of councilors. As already stated above, chiefs in the traditional courts usually do not have formal education. However, they are well versed in the customary law they apply. Formal or conventional courts are relatively conservative regarding the administration of justice.[145] The chiefs and elders are not qualified to adjudicate in

[143] *Ibid* at 200.
[144] Laurence Juma, "Reconciling African Customary Law & Human Rights in Kenya: Making a Case for Institutional Reformation & Revitalization of Customary Adjudication Process" (2002) 14:3 ST. Thomas L Rev 459.
[145] Emmanuel M Kiye, "Conflict between Customary Law and Human Rights in Cameroon: The Role of the Courts in Fostering an Equitably Gendered Society" (2015) 36:2 African Study Monographs 75-100.

matters involving common law or statutory law as they lack expertise.[146] As such, lawyers from the formal court must educate traditional rulers on the procedures and rules of English common law. This entails educating traditional rulers to infuse principles of equality in their settlement of disputes regarding intestate succession. Lawyers from the formal court must also assist women in seeking redress in state courts if the proceedings in the traditional courts discriminate against women in the devolution of intestate property.[147] Lawyers can assist women by educating and providing resources for them to access the formal courts. This can put pressure on the customary courts to address inheritance issues from the perspectives of women. Non-governmental organizations and the Government should liaise with lawyers to assist women with financial resources to access the formal courts.

A second critique of the composition of traditional courts is the lack of a role for women. In traditionally patriarchal Ghanaian society, women do not secede to chieftainship and therefore are unable to preside over traditional courts.[148] Men are mostly installed as chiefs in Ghana and the council of elders is also usually men. As such, decisions taken in intestate succession cases are usually male biased and reflect the patriarchal values of Ghanaian society. Therefore, the presence of women in the traditional court will influence the patriarchal tendencies and male bias of the chief and councilors in the devolution of intestate property.[149] Female litigants who have faced discrimination from their deceased husband's relatives will be better understood if there are women as part of the councilors in the traditional court. Even though the number of women on the bench are not equal to the number of men in the formal court, the few on the bench could participate

[146] Mgbako & Scurry Baehr, *sup*ra note 41 at 174.
[147] *Ibid* at 174.
[148] Minneh, Oloka- Onyanyo & Tejan-Cole, *sup*ra note 39 at 13.
[149] *Ibid* at 13.

in the proceedings of the traditional court to encourage traditional rulers to appoint women as part of the counselors.[150] Additionally, queen mothers should recommend other women who are knowledgeable in customary law to traditional rulers. Traditional rulers should include queen mothers and other women knowledgeable in customary law in the proceedings of the traditional courts.

The presence of women can influence the decisions of the traditional court in intestate succession cases. The legislature must include a provision in the Constitution of Ghana to ensure that women are given equal participation in the proceedings of the traditional court as men.[151] For example, in South Africa, the draft of the traditional Court Bill, which seeks to harmonize traditional courts with the requirements and protections laid out in the South African Constitution, addresses the role of women. Section nine, which specifically addresses procedure, mandates that the presiding officer must ensure "that women are afforded full and equal participation in the proceedings, as men."[152] The participation of women in the decisions of the traditional court will assist in preventing discrimination and inequality women face in claiming their inheritance rights.

The participation of women in the proceedings of the traditional court is not rooted in the Ghanaian tradition. Therefore, including women in the proceedings of the traditional courts will not be an easy process. However, I propose a gradual ongoing dialogue with the chiefs on the importance of allowing women to participate in proceedings of the traditional court especially in intestate succession cases. Women who are repositories of customary law such as queen mothers must be given an opportunity to participate in the proceedings of the court. In educating the chiefs, law

[150] *Ibid* at 13.
[151] *Ibid* at 13.
[152] South Africa Traditional Court Bill of Traditional Courts,2017, s 9.

reformers must refer to existing traditional structures to appeal to the chiefs. Culture provides the context in which universal notions of rights must be interpreted and appropriated to be meaningful and effective. For example, law reformers can highlight the fact that queen mothers settle disputes in the communities using customary laws. Therefore, their in-depth knowledge in customary law will contribute to the proceedings of the court and address some of the concerns of women.

A notable element of traditional courts is that they do not allow legal representation. Some African scholars have argued that these courts should be abolished because of this deficiency or, that they should be required to allow legal representation.[153] However, in this regard, it has been pointed out that a presiding traditional court's chief is not a trained judicial officer. Indeed, many chiefs have no formal education at all.[154] One concern with allowing attorneys and advocates to participate in customary court proceedings is that it would introduce the element of litigation costs that are unknown to these courts. Such legal representation may be counterproductive to the freedom of parties to participate in unfettered ways in the courts. I propose that Queen Mothers participate in the traditional courts to represent women and address their concerns. This will promote gender equality in the traditional courts and infuse principles of equality and non-discrimination in the arbitration of intestate succession cases.[155]

The final critique of the traditional court is that there is a lack of record-keeping. All proceedings are conducted orally in the language most widely spoken in the jurisdiction of the court. The decisions of the traditional courts are not recorded, so it is difficult to monitor the substance of the

[153] Minneh, Oloka-Onyango & Tejan-Cole, *supra* note 39 at 12.
[154] *Ibid* at 12.
[155] *Ibid* at 15.

decisions made. Additionally, since decisions are not recorded, there is inconsistency in the decisions of the court.[156] One cannot blame the traditional court for lack of recording, but many chiefs who preside over the court do not have formal education or education that is sufficient to enable them to make satisfactory recordings of proceedings.[157] However, the formal court is known for the recording of its cases. Therefore, judges and lawyers must assist the presiding chiefs of the traditional courts in recording, especially when intricate points of law arise. Closely related to the issue of the traditional court, not recording is the question of codification of customary law. The inability to compile customary law is because of the lack of recording of customary law cases. Legal reformers can create a unified law in Ghana when customary law is unified into one body of law. In addition, if customary law is recorded, the traditional court can often assess and eliminate the outmoded customary laws.[158] This will help them apply living customary law which reflects social and economic changes and women's current direct and indirect contribution toward the acquisition and maintenance of matrimonial property.

It will be prudent to obtain some lessons from other African countries regarding legal dualism specifically the interaction between traditional courts and formal courts. In Liberia and Sierra Leone, for example, paralegal organizations such as the Justice and Peace Commission's Community Legal Advisor (JPC) and Timap for Justice respectively, are two paralegal organizations committed to the legal empowerment of the chiefs and local people.[159] Timap for Justice is made up of twenty-seven paralegals supervised by two lawyers in thirteen paralegal offices throughout Sierra Leone. JPC gets financial, technical, and legal assistance from the Carter

[156] *Ibid* at 15.
[157] *Ibid* at 15.
[158] *Ibid* at 15.
[159] Mgbako & Scury Baehr, *supra* note 41 at 174.

Center's Liberia Office and employs thirty-five community monitors in two regional offices and eight county offices. The two organizations engage in legal dualism, promoting the positive development of customary law and confronting injustice within customary forums by appealing to the formal system. [160] The JPC of Liberia has organized workshops to educate the chiefs about formal laws, specifically, the intestate succession law and other human rights provisions. Some of the chiefs educated by these paralegals stated that "the law that the JPC is talking about, this is the first time we are hearing it. If they continue to do this, it will help us".[161] According to the paralegals, these chiefs do not believe that a woman is entitled to the property. Customary laws relating to matrimony and inheritance still regard women as chattels themselves. Women are therefore less likely to get satisfactory recourse from traditional rulers and courts for complaints of discrimination.[162] As such, the paralegals hope that through education, the chiefs will adopt and apply the principles of equality and non-discrimination in the Common law. This is not necessarily for the chiefs to alter customary law of succession. However, this is to enable chiefs apply equality and fairness in their decisions concerning intestate succession. In a case where a widow brings a case to the chief that her husband's family is trying to take her property, a chief should equally distribute the properties between the widow and the deceased extended family.[163]

Another aspect of interaction that the JPC also ensures is that the paralegals help women who wish to appeal the chief decision to a higher authority (formal court). If advocacy at the traditional court is not successful, the JPC monitors the litigants' appeal to the formal court. The interaction must

[160] *Ibid* at 174.
[161] *Ibid* at 174.
[162] *Ibid* at 174.
[163] *Ibid* at 174.

not be one-sided.[164] The formal courts also must acquire some knowledge about customary law and incorporate them into their interpretation of the Common law. The formal courts in Ghana can acquire more knowledge of the underlying principles of the customary law of succession and the core values of customs from the traditional courts. This will enable them to make fair judgments concerning the inheritance rights of women.[165] To acquire knowledge on the underlying principles of customary law, lawyers from the formal courts should participate in the proceedings of the customary law courts. Lawyers can observe how chiefs implement the customary law of succession and ask questions about the underlying principles of customary law. Lawyers from the formal courts should frequently visit the customary law courts to ensure that the interaction and education between the two courts are ongoing and comprehensive.

I cite examples of other countries where the formal and traditional courts interact. Kenya is one of such countries. The unified court system in Kenya was initiated with the aim that all laws, customary law included, would be officially promulgated as codes.[166] The draftsmen of the Kenyan law held that an interaction between the formal and traditional courts would enhance the rights of women and promote political unity amid the political party conflict present in the immediate post-independent period. Similarly, in Zimbabwe, the customary courts set up under the colonial administration were not eliminated. Rather, the new government enacted the Customary Law and Primary Court Act to promote their operation.[167] The legislature later amended the bill to the Customary Law and Local Court Bill to streamline the activities of the court and bring them in conformity with modern principles of law and administration of justice. Likewise, in Uganda,

[164] *Ibid* at 174.
[165] *Ibid* at 174.
[166] Juma, *supra* note 145 at 459.
[167] *Ibid* at 459.

Local Council Courts initially set up at the community level are recently officially incorporated into the formal legal system by legislation.[168]

Also, in the Solomon Islands, current Native Courts were set up by statute in 1942 to resolve the conflict between parties living in the area where the courts are situated. Parties can seek an appeal from the local Courts to either the Magistrates' Court or the Customary land Appeals Court in cases of land conflicts. Even though the local Courts apply customary law, their rules and procedure are modeled on western courts.[169]

5.4 Technical challenges associated with a unified law.

The drafters of law can face technical problems in the unification of national law. The structure and language of any new unifying law are clearly of principal significance.[170] The choice of legal language is often influenced by factors that discourage innovation and straying from familiar patterns. As far as the common-law world is concerned, the main challenge in drafting the law is to locate suitable models, if any, which may be adapted to the needs of the given country. Outside of the area of criminal law and procedure, evidence, succession, contract, and commercial law, the common law does not offer many examples of a successful codification, or of codes readily adaptable to economically developing countries where ethnic, cultural, and religious pluralism is still the order of the day. In default of a model, the draftsman must think the challenges out for themselves.[171] In many common-law countries in Africa, draftsmen have failed to value the many effects of their new laws or have expressed their intentions vaguely.[172] The Uganda Bill for

[168] Minneh, Oloka- Onyango & Tejan-Cole, *supra* note 39 at 6.
[169] *Ibid* at 8.
[170] Allott, "The Unification of Laws in Africa" *supra* note 19 at 51.
[171] *Ibid* at 51.
[172] *Ibid* at 51.

Succession Act shows another shortcoming, that of excessive detail with its complex percentage divisions of an intestate's estate according to the particular combination of surviving relatives.[173] There is a debate about which of the Romanist systems are more ready to adopt a new unifying code that legislates only in general principle, leaving the details to be filled in by the creative action of the courts. Another debate against excessive detail is that the new African law, especially that which alters existing laws that everyone understands, ought to be relatively easy to understand and to explain to those affected by it.[174]

Another challenge is that of judicial interpretation of the new law, which may cancel out some of the beneficial unifying impacts of the law through qualifying its terms by reference to the old laws. These appendages may weaken or dismantle the unificatory impact of the new law.[175] As for the language of the unifying laws in a more exact sense, it is almost unavoidable that laws in sub-Saharan Africa will continue to be drafted in the future, as it has been in the past in a major European language.[176] The linguistic point is an interesting one since it might seem that the easiest way to get a new law which was at the same time uniform, "African," and intelligible to the common people and which makes a fresh beginning free from the preconceptions of foreign law, is to draft and promulgate it in an indigenous African language which was nationally understood.[177] Regrettably, very few African countries possess such an autochthonous national language, and many of those states which are so fortunate make little or no use of it.[178] Most African countries have a variety of local languages of local customary laws, and their best hope of national and

[173] *Ibid* at 51.
[174] David Rene, "The Methods of Unification" (1968) 16 AM J Comp L 13.
[175] *Ibid* at 13.
[176] *Ibid* at 13.
[177] *Ibid* at 13.
[178] *Ibid* at 13.

linguistic unity is through the introduced European tongue. Even if a state has an indigenous national language, it is a problematic task to make new laws in this language that fit in with the rest of the corpus of common and statutory law in another language and which could be administered by the courts whose proceedings and style are English, French or other colonial languages. One of the few states where this is currently a live question is Tanzania.[179] The unified statement of customary law was originally prepared and promulgated in Swahili, not English. The words of the unified statement of customary law are simple and legal rules are expressed in exact terms. Discussions in the Assembly are mostly carried on in Swahili, even though the legislation is promulgated in English. Any doubts about the capability of Swahili to express a variety of legal ideas with enough precision are addressed by the preparation and publication of a Swahili-English dictionary in Dar es Salaam.[180] Law reformers in Ghana should promulgate the legislation in English. This is because the judiciary is oriented towards the common law tradition and all proceedings are carried out in English. The legislation can later be translated into other local languages such as Akan, Ewe and Ga for the local people to understand.

From the technical point of view, another major challenge is reconciling judicial concepts, rules, and institutions that differ greatly from system to system. It is not just a question of finding a via media between two European systems as is done in Cameroon and Somalia.[181] It is a question of finding an alternative new law that harmonizes and unifies customary law and the state law. [182] Most African countries are talking of or carrying out the unification of the various customary laws within their frontiers. This may bring nearly as great challenges as the reconciliation of western

[179] *Ibid* at 13.
[180] Allott, "The Unification of Laws in Africa", *supra* note 19 at 87.
[181] *Ibid* at 87.
[182] *Ibid* at 87.

and indigenous ideas. If, as some commentators state, all these customary laws are fundamentally the same, the work of unification rarely seems important; if they are as distinct as others believe, unification must mean a basic departure from the rules of many or most of these systems. In the latter case, it would hardly be important to state that the new law was a progression of the old.[183] Confronted with these theoretical objections, some jurists or governments feel that the only way out is through the wholesale prevention of the conflicting systems, and their replacement by a newly codified law that must inevitably be western in character. However, I disagree with such a proposition as a newly codified law with a solely western character will not thrive on African soil. This is because it will be perceived as foreign and will not be accepted by the people.

Proposals for uniformity of laws, whether by the reconciliation of existing systems, avoidably pose the question of how far it is possible to impose and operate a unified law in a society that is fragmented and diverse. Gross diversities of race as with African, Arab, European, and Asian elements in East Africa – are found in some countries but are relatively insignificant numerically.[184] The more subtle diversities are those between local ethnic groups or communities, which may be divided by different laws, languages, cultures, and economics. Religion, specifically Christianity and Islam, may also divide one group or community from the next. Educational and class classification has also led to a separation between the older illiterate generation from the younger western-educated one.[185]

In England too, there are variations of class and behavior, but we do not directly legislate for them. A question to be asked is whether the differences in African countries are too great to be addressed

[183] *Ibid* at 87.
[184] Eugene Cotran, "The Unification of Laws in East Africa" (1963) 1:2 The Journal of Modern African Studies 209-220.
[185] *Ibid* at 210.

in the same way.[186] A new uniform law, I recommend, can only work in the long run if it has a measure of popular understanding and acceptance. For example, in Zambia, the provisions of the Intestate Succession Act are available to all Zambians. However, it is largely unaccepted and disapproved by people since its terms are foreign to the family systems in which most Zambians live.[187] Ultimately, for a uniform law to be effectively enforced, the law should resonate with the people, and be respected and adapted to the cultures in which it will be applied. Ghana can learn lessons from Zambia by designing a unified law that is in simple terms and reflects the culture of the people.

Finally, I argue that it is not enough to compose a policy to unify laws. A competent person must carry it out.[188] Who are the experts competent to draft these laws? A great deal is required of them: the experts must be accustomed to the rules of the existing laws which they wish to harmonize or unify, and they must understand the problems of conflict and the methods of reconciling them between different legal systems. The experts must also acknowledge how the new law which they are preparing will fit into the society for which it is being drafted, in other words, the social and economic effects of the new law.[189] Ghana must employ highly skilled drafters who will come up with a unified law. In other words, the people who draft the law must be knowledgeable in the existing laws (particularly difficult where customary laws are involved), they must comprehend the problems and methods of comparative law, understand the workings of socio-legal dynamics, and be trained in the techniques of drafting.[190] The School of Oriental and African Studies is

[186] Allott, "The Unification of Laws in Africa", *supra* note 19 at 87.
[187] Abby M Richardson, "Women's Inheritance Rights in Africa: The Need to Integrate Cultural Understanding and Legal Reform" (2004) 11:2 Human Rights Brief 4.
[188] Allott, "The Unification of Laws in Africa", *supra* note 19 at 51.
[189] *Ibid* at 51.
[190] *Ibid* at 51.

presenting a special study on the unification of laws and drafting problems in Africa. The School of Oriental and African Studies Restatement of African Law project has been researching and giving advice on the investigation and harmonization of customary laws with statutory law.[191] The International African Law Association which brings together scholars and practicing lawyers from diverse backgrounds and countries that share interest in African law, has constituted a special expert panel to advise on the technical problems arising from the international integration or unification of laws in Africa.[192] Skilled drafts people in Ghana chosen for the unification project could obtain technical advice from these institutions on how to unify customary law and the common law in Ghana.

I argue that the creation of a unified law comes with challenges. Agreeing with Allot, "the reconciliation of judicial concepts, rules, and institutions which may differ between two legal systems could present a technical challenge, but there is a need to find an alternative new law which reconciles and unifies the old, even if they are as different as unwritten customary law on the one hand and written common law on the other hand."[193] Therefore, Ghana should implement these schemes for a unified law that will apply to every Ghanaian irrespective of culture and the diverse succession laws practiced.

5.6 Conclusion

Ghana should develop a unified law that reflects its multi-ethnic setup. As challenging as it is, the process of creating a national normative framework must begin with an empirical inquiry into

[191] *Ibid* at 51.
[192] *Ibid* at 51.
[193] Allot, "Towards the Unification of Laws in Africa", *supra* note 38.

customary law and it is impossible if it is an unwritten system of law.[194] There is a need to put existing customary laws into writing in a manner that reflects its values and spirit. Ghana can borrow a leaf from Malawi, Kenya, Botswana, and Swaziland (Eswatini) which have a restatement of customary laws. The next chapter is a case study that gives a comprehensive account of how the restatement of law approach has worked and evolved in these four African countries.

As part of the scheme of establishing a unified law, I also propose that Ghana should have a court system where the formal and traditional courts would interact.[195] Currently, the traditional courts operate in parallel to the formal administrative court system in the country.[196] The formal court and traditional courts must interact. Both the state and the traditional courts should infuse principles of equality and non-discrimination in their interpretation of customary law. State courts can interact with the customary law courts to ascertain the underlying principles of customary law that underpin people's adaptation of customs to socio-economic change. Ghana should enact an integrated law such as that of Kenya and South Africa that will reconcile individual and communal values to reduce the dominance of patriarchy and gender discrimination, especially in the inheritance regime.[197]

[194] Nwauche, *supra* note 66 at 63.
[195] Tsalim, *supra* note 35 at 287.
[196] Toomey, *supra* note 138 at 156.
[197] South Africa, Kenya and Malawi have an integrated national law. Kenya and Malawi have a comprehensive restatement of customary laws that has been integrated into the common law.

CHAPTER 6: CASE STUDIES ON RESTATEMENT OF LAWS IN OTHER AFRICAN COUNTRIES

6:1: INTRODUCTION

In chapter 5, I proposed the restatement of law approach for Ghana to unify existing customary laws. This chapter analyses how the restatement of laws has worked and evolved in other African countries including Kenya, Malawi, Botswana, and Swaziland (Eswatini). These four listed countries are useful case studies for Ghana to undertake the restatement of law approach.

(I)Restatements of law in Kenya

One of the first African countries to reject the codification of law method is the Republic of Kenya. The authorities in Kenya described codification as the "crystallization" or "petrification" of an otherwise changing set of laws. According to the Chief Secretary, "changing conditions in Kenya's codification will stifle evolution."[1] In 1951, the Chief Native Commissioner replied to questions in the Legislative Council concerning the rapid disappearance of "good" African customs, with the response that "customary law, of course, is changing fast, which was a thing right and proper and that a code of customary law is certainly not a thing that is desirable."[2] When the School of Oriental and African Studies started its restatement of African law project, Kenya was one of the countries that embraced the project. The project sought to promote the recording of customary laws in African countries and to organize a uniform series in which such research might be published and studied. The first two volumes of the restatement project were prepared by Cotran

[1] Bret L Shadle, "Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya'' "1930-60" (1999) 40: 3 J Afri Hist 421.
[2] Eugene Cotran, *Kenya: The Law of Marriage and Divorce, Succession* (London: Sweet and Maxwell,1968) 213.

and published in Kenya. He was appointed as a high court judge in Kenya in 1977 and later a law commissioner from 1967 to 1982.[3] Cotran depended mainly upon his deliberations with informants in preparing his statements, conducting his investigations through law panels made up of persons believed to have special knowledge of customary law. For the goal of this research to be achieved, Cotran divided the ethnic groups into fifteen (15) groups, each group being represented by one law panel.[4] The law applicable to each group was contained in the separate restatement, and internal differences were taken note of when found. The customary law recorded in the restatement is that of the present, and care was taken to show any recent developments which might be of uncertain scope.[5] In the first volume named *The Law of Marriage and Divorce*, each restatement follows a uniform organizational plan with eight main sections on capacity and consents, the formation of marriage, marriage consideration, essentials of a valid marriage, matrimonial rights and duties, matrimonial and cognate offenses, and the effects of death upon marriage.[6] Cotran's previous report on customary criminal offenses in Kenya excluded much clarity, precision and critical analysis. In Cotran's second report, the rigidity of the language which is characteristic of criminal law has been relaxed into a less complicated narrative style that better matches up to the treatment of civil matters.[7]

The title of the volume and the eight main headings of the book suggests that many areas of what is broadly called "family law" are excluded from the restatements or addressed only in passing where mentioned. Such areas include guardianship, affiliation and adoption, and the tenure of

[3] *Ibid at 200.*
[4] *Ibid at 200.*
[5] Eugene Cotran, "Marriage, Divorce and Succession in Laws in Kenya: Is Integration or Unification Possible"? (1966) 40:2 J Afri L 194-204.
[6] *Ibid* at 194.
[7] *Ibid* at 200.

property in the family.[8] These are the subjects that go to the very roots of the law of persons and of which some knowledge is relevant if the laws of marriage and divorce applicable to a particular ethnic group are to be fully understood. In preparing future publications in this series, the editors would help the reader by making sure that discussions of marriage and divorce are soundly inculcated in the law. Cotran also excluded other forms of matrimonial relief other than divorce. Most of the matrimonial proceedings before customary courts end not in divorce, but with the court granting some other form of matrimonial relief, such as an order that the parties return to a peaceful cohabitation, that one party pays the other some compensation, or that the husband takes care of the wife and children. Such orders are usually made in the Kenyan customary courts; it is unfortunate that they were not discussed.[9]

The second volume was on the Law of Succession. Cotran employed the same method of investigation and presentation for this volume, except that of two ethnic groups, including the Giriama group, were treated separately for the previous volume, thus increasing the number of restatements to 17.[10] Cotran's use of diverse ethnic groups for the volume on the law of succession serves as an example for Ghana. Law reformers should progress beyond the one ethnic group used by Kludze to include diverse ethnic groups in Ghana. Including several ethnic groups in the restatement of law will give judges a wide range of information on customary laws of succession. This will assist them in the interpretation and application of customary law in succession cases.

In the same way, each restatement in this volume follows a uniform organizational plan: principles of succession and the distributable estate, administration of estates, intestate succession, dispositive and testate succession, and the succession to rights and duties concerning persons. As

[8] Mark W Prinsloo, "Restatement of the Indigenous Law" (1987) 20: 3 Comp & Intl LJ S Afr 411-420.
[9] *Ibid* at 413.
[10] Eugene Cotran, "The Unification of Laws in East Africa" (1963) 1;2 J Mod Afr Stud 209-220.

Cotran asserts, dispositions inter vivos and wills are very commonly resorted to, usually with considerable effect on how a property of a person is distributed. [11]

The section on intestate succession is also disappointingly concise, giving only the most general idea of how an estate is divided. In the case of lands, for instance, some restatements state that the land is "divided equally among the sons.''[12] Again, with issues of livestock, some cases state "that they are equally divided among the sons"; in other cases, the livestock are divided "in such a manner that each son receives a share which is slightly larger than that of his immediate junior."[13] This may offer some information but some more elaboration would have been helpful. For example, it is unusual for all forms of livestock, from cows to chickens, to be distributed in the same way. In the same vein, one might have expected cattle distribution to be impacted by the mode of acquisition.[14] Of course, it is true that in the customary law system, not all properties are divided in the same way, with the result that any rules stated are no more than guiding principles.[15] However, some more detail would have been helpful, possibly in the form of comments on the rules stated. Still, these are very minimal omissions that do not detract in any way from the significance of Cotran's work, which will deservedly have a great influence on similar programs in other parts of Africa. It is with these other programs in mind that two general remarks may be made. The first concern is with the method used to ascertain what the customary law of a specific ethnic group is.[16]

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[11] *Ibid* at 220.
[12] Eugene Cotran, "Marriage, Divorce and Succession Laws in Kenya: Is Integration or Unification Possible" (1996) 40:2 J Afr L 194-204.
[13] *Ibid* at 195.
[14]Richard L Abel, "A Bibliography of the Customary Laws in Kenya" (1970) 6 E Afri LJ 100.
[15] Winfred Kamau, "Judicial Approaches to the Applicability of Customary Law to Succession Disputes in Kenya" (2105) E AFR LJ 140.
[16] *Ibid* at 140.

The Kenyan restatements depend almost totally upon the examination of panels of informants considered to be knowledgeable about customary law, and even though the reports of the Courts of Review are referred to, no use was evidently made of the records of the customary courts themselves.[17] This is probably due to a shortage of time or the poverty of records available, but it cannot be urged too strongly that where customary courts' records exist, these should be a primary source in establishing what customary law is in the future.[18] Some characteristics of the customary law that are well documented in the records simply did not emerge in the discussion with informants. This is particularly the case in those areas where contemporary law has moved away from the traditional position.[19] Even with a scant record, the chance documentation of the statements of a witness in court may provide the recorder with a thorough understanding of the law that he could never have obtained in deliberations with the informants.

The second point relates to the reason for which the restatements are designed. The aim of the Kenya restatements is to serve scholars and be of practical use to the Kenyan judiciary. These two requirements are inevitably very difficult to meet.[20] From the perspective of the scholar, much more detail and explanatory matter would have been relevant. (e.g., in connection with the rules of succession to property mentioned above.) Simultaneously, the scholar would have liked to know about differences of opinion amongst informants, where such differences existed, rather than being faced with results hammered out through argument and compromise.[21] On the other hand, those using a restatement in the field demand an agreed version and might regard much of what the

[17] Eugene Cotran, "The Development and Reform of the Law in Kenya 1" (1983) 27:1 Jafri L 42-61.
[18] *Ibid* at 50.
[19] Bessie House-Midiamba, "Legal Pluralism and the Attendant Internal Conflicts in Marital and inheritance Laws in Kenya" (1994) 49:3 Africa 375-392.
[20] Shadle, *supra* note 1 at 411.
[21] *Ibid* at 411.

scholar would want to know as irrelevant. In this context, it is important to state that restatements may be of limited practical value unless translated into the vernacular. Unequivocally, a singular program of research can provide material that is valuable to both the scholar and the judicial officer. What is debatable is whether the demands of both can be so satisfied by the same method of presentation.[22]

Another major setback of the restatement is that Cotran also structured his questions according to English legal principles not according to principles of customary law. This is a gap in his work that law reformers in Ghana should address. Customary law should not be viewed through a common law lens. This is because the features, rules and processes of customary law differ from the English common law. In designing a restatement of customary law, the principles and rules should be maintained.

It is recently well known that amongst most African people, rights in a given piece of land might be held by several individuals. For example, a person may hold the right to use the land whilst the right to transfer it resides with the lineage.[23] However, the volume on succession suggests that for each ethnic group, a man's property is distributed among his heirs, each holding in his share the same rights as the deceased enjoyed. Cotran fails to make differences between self-acquired and inherited property. He even disregards a Court of Review case that differentiates self-acquired and inherited properties. The Court of Review confirming the judgment of the District Officer and most of his assessors held that the coconut trees planted by a Duruma man, and, by extension, all self-acquired property should pass to his son, inherited property alone transferred to a brother.[24]

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[22] *Ibid* at 411.
[23] William Twining, "The Restatement of African Customary Law: A Comment" (1963) J Mod Afr Stud 221-228.
[24] *Ibid* at 221.Cotran fails to cite case no.6 where the Court of Review differentiated the heirs of a self-acquired property and an inherited property.

The text of the restatement asserts that according to customary law, the distribution of property is based on the type of the marriage contracted. The self-acquired property that mainly went to the eldest brother of the deceased is now giving way to a system where sons inherit all of a man's property. No mention is made of the principle identified in the Court of Review.[25] The restatement does record, where relevant, that a widow receives a life interest in land cultivated by her during her husband's lifetime but other examples of limitations of rights held in inherited property are not given. In the light of this, I find that more efforts should be made to constitute the customary law of property in a further volume in this series. Even though the customary law on property may look insignificant, I opine that it is complicated enough to be dealt with in another volume.[26] Law Reformers who would be involved in the restatement of law project in Ghana should highlight the difference between self-acquired and inherited properties. Stating the difference is imperative as judges will know how to fairly share intestate properties. Inherited properties should be given back to the extended family and self-acquired properties equally shared between the wife and the extended family. This will reduce the conflict between the extended and the immediate family of the deceased.

It is also worth highlighting that the restatement of law approach is a slow process and not cheap. The recording and publication of the restatement of law project in Kenya began in 1961. It took seven and eight years respectively before the volumes 1 and 2 were completed.[27] Ghana should therefore note that the restatement of law project is time-consuming and financially demanding.

[25] *Ibid* at 223.
[26] Stephen Cretney, "Restatement of African Law in Kenya" *(*1970)33:1 Mod L Rev 114-116.
[27] *Ibid* at 114.

The recording of customary laws in Kenya has preserved customary rules that have long fallen into abeyance locally.[28] Cotran, the author of these two restatement volumes, trusts that the restatements of law would be repeatedly amended and may incorporate more case materials in the future. Both volumes try to show the future directions of law either by comparing traditional rules with modern rules or by citing modern developments. Cotran's restatements of customary law has helped judges immensely as they have resorted to it in their interpretation of Kenyan customary law in succession cases.[29] Judges have high regard for restatements associated with the customary law of succession. For example, in *Mary Gichuru v Esther Gachuhi* and *Karanja v Githara,* the court relied on the statements in Cotran's restatements on the content of customary law.[30] Likewise, in *Mwathi v Mwathi*, the Court of Appeal recognized statements in the restatements on Kikuyu customs associated with the devolution of the property of an intestate as binding or conclusive.[31] Similarly, when a comprehensive restatement of law is promulgated, the Ghanaian courts can rely on them in the devolution of intestate property.

(II)Restatements of law in Malawi

The restatement of law project in Malawi has two volumes. The first is the volume on The Law of Marriage and Divorce. This volume was prepared in the face of unusual challenges. When J.O. Ibik carried out his fieldwork under the patronage of the Restatement of African Law project, the Biafra crisis obstructed him from helping to prepare the work for publication.[32] Ibik was in Nigeria

[28]Eugene Cotran, "The Place and Future of Customary Law in East Africa" (1996) 12 Intl & Comp.LQ 72.
[29] *Ibid* at 72.
[30] *Gichuru v Gachuhi* Civil Appeal No 76 of 1998; see also *Karanja v Githara* (1999) eKLR.
[31] *Mwathi v Mwathi* (1995-98) E A 229. In this case, the court referred to the Kikuyu customary law which states that sisters cannot inherit their brother's land. The estate of the deceased was dealt with according to the customary law regulating the intestate succession of a deceased Kikuyu.
[32] J.O Ibik, *The Law of Land, Succession, Movable Property, Agreement and Civil Wrongs*, Vol 4, Restatement of African Law Project (London: Sweet & Maxwell,1971) 209.

at the time of the publication of his work. This made it impracticable for the editors to clear up several minor uncertainties and obscurities, which would have been quickly dealt with otherwise. A more basic challenge was encountered by Ibik during the research in that Malawi currently provides a very baffling mixture of ethnic groups and social systems.[33] Both matrilineal and patrilineal systems were evidently found in adjacent villages claiming to constitute members of the same ethnic group. This latter challenge seems to have been increased by Ibik's decision to use law panels on a regional rather than an ethnic basis.[34] In some situations, the general editor and editorial committee must be applauded for their contribution to this volume. Ibik's method of investigation and presentation is like that of Cotran, even though an attempt is made to relate the law of marriage and divorce to the law of persons.[35] Ibik prefaced each restatement with an introductory account of the social structure of the group involved. A major initiative of the Malawi volume is the liberal use of the vernacular language. The use of expressions in Malawian languages might have been helpful for the author to capture the essence of the traditional or customary practices that relate to law. However, the use of terms in the local language in the publication without providing a glossary hampers the non-native readers' proper appreciation of the work.[36]

The Law of Land, Succession, Movable Property, Agreement, and Civil Wrongs is also the fourth volume of the restatement of the African law project of the school of Oriental and African Studies and the second in its Malawi series.[37] The restatements in both Malawi volumes were originally compiled by Ibik in his capacity as customary law commissioner to the government of Malawi.

[33] *Ibid* at 198.
[34] *Ibid* at 200.
[35] *Ibid* at 200.
[36] Van Niekerk, "Malawi: The Law of Marriage and Divorce" (1970) 3 Restatement of African Law Series 412-414.
[37] *Ibid* at 412.

The volume on land and succession is divided into three parts. The first two constitute the customary land laws and laws of succession of ten (10) ethnic groups while the third contains a restricted number of restatements dealing with the laws of movable property, agreement, and civil wrongs in the same groups and one other group.[38] Each part commences with an outline of the general (statutory or 'received' law of Malawi). Ibik as in the case of Kenya, obtained his main source of information from locally constituted law panels which had a membership representative of the main interest involved. Additionally, a National Council of Malawi Customary Law was set up, which provided a forum for the deliberation of national problems affecting customary law and its development.[39] The Law Reformers in Ghana can take a similar initiative by reviewing and deliberating on issues affecting customary law. Reviewing the current state of customary law will highlight the need for a restatement of customary laws in Ghana.

Ibik's volume on succession has made an impact on the unification of customary laws of succession in Malawi. However, his work has a few criticisms which law reformers in Ghana should pay attention to. First, apart from a plentiful supply of explanatory footnotes, the origins, variations, and development of the component laws of each ethnic group are not explained or compared in this volume.[40] Secondly, the customary laws are also stated in the format adopted in the orders in council used in some commonwealth countries for stating aspects of the customary law of individual ethnic groups. The Law Reformers in compiling the Restatement of laws should provide a comprehensive statement on the origins, variations, and development of the various laws of the ethnic groups in Ghana. Providing a detailed statement on the origins and variations of the

[38] Simon Roberts, "A Revolution in the Law of Succession in Malawi" (1966) 10:1 J Afr L 21-32.
[39] *Ibid* at 24.
[40] Simon Roberts, *Restatement of African Law: The Law of Marriage and Divorce* (London: Sweet & Maxwell, 1968) 213.

customary laws will help the judiciary distinguish between the various customary laws of the diverse ethnic groups in Ghana. Additionally, providing a comprehensive statement on the development of the customary laws will help the judiciary apply living customary laws. Judges will know the changes that have occurred with these customary laws. Despite the above-mentioned criticisms of Ibik's work, the volume will be a helpful working tool for anthropologists and lawyers operating in customary law.[41]

(III)Restatement of law in Botswana

The Botswana volume is the fifth volume of the Restatement of African Law series. The first of Isaac Schapera's compilation of Botswana's customary law is the *Handbook of Tswana Law and Custom*.[42] The colonial office had begun to reform the system of indirect rule in Africa and in 1934 the Bechuanaland administration issued two reform bills, the Native Tribunals Proclamation, and the Native Administration Proclamation. This greatly restricted the powers of the chiefs and established a new tribal council and a hierarchy of customary courts.[43] In the years immediately before the proclamations, the administration had been particularly exercised in disputes with Tshekedi Khama, the regent of the Ngwato people, the largest tribe ethnic group in the country. Tshekedi and other prominent chiefs were afraid they would be overthrown.[44] Because he got the information that the new high commissioner Lt-Col. Rey had written in his diary soon after assuming office that the chiefs "practically do as they like – punish, fine, tax and generally play

[41] *Ibid* at 200.
[42] Simon Roberts, "The Tswana Polity and "Tswana Law and Custom" Reconsidered" (1985) 12:1 J S Afri Stud 75-87.
[43] Isaac Schapera, *A Handbook of Tswana Law and Custom* (London: Routledge Press,2019) 362.
[44] *Ibid* at 200.

hell. Of course, their subjects hate them but dare not complain to us; if they did, their lives would be made impossible".[45]

In discussions with the Native Advisory Council, representatives had remarked that a young generation of chiefs were coming to office who did not know of Tswana traditions and would need guidance in the administration of the law. It was partly in response to these concerns and partly to help magistrates in their work, that the administration decided to commission a handbook of Tswana Law.[46]

Schapera decided to work on this book in 1934. In his introduction to the handbook, Schapera states that it is a book of laws and not a study of the role of law in society. He states that there was not a single body of customary law that applied throughout Bechuanaland. Individual chiefs had introduced laws of their own: laws prohibiting bride wealth, others insisting on it and even setting rates of payments.[47] The handbook was not written as a compilation of the old body of Tswana law. Rather Schapera's main goal was to give a statement of law that was current and relevant to the people.[48] This was the most inventive component of Schapera's codification, the insistence on the emergence of a modern Tswana law fuelled by traditional principles, tribal and governmental legislation that reflected changes in society. The handbook became widely used in Tswana courts and political disputes. Despite, the significant impact that Schapera's handbook of Tswana law makes, it has some critical areas that he ought to have improved.[49]

[45] M Sanders, "The Internal Conflict of Laws in Botswana" (1985) 17: 1 Botswana Notes & Records 77-78.
[46] *Ibid* at 77.
[47] Simon Roberts, "The Recording of Customary law: Some Problems of Method" (1971) 3:1 Botswana Notes & Records 12-21.
[48] *Ibid* at 15.
[49] *Ibid* at 15.

First, Schapera's lack of references to any authorities on the traditional laws of the local people raises certain fundamental problems. Even though his opinion of law is based on the familiar positivist dictum of Oliver Wendel Holmes and Roscoe Pound that law is what the courts enforce, he also admits that it was "impossible to isolate legal rules absolutely from other rules of conduct."[50] Schapera recommended that the criterion for identifying a law should be the likelihood that the court would implement a particular rule but had to concede that this was not a straightforward calculation. The diverse customary courts followed their own precedents, and a particular court was not always consistent with its application of the law.[51] In practice, Schapera indirectly decided which rules should be codified as laws and which ones should not.[52] The handbook has also been criticized for focusing on the Ngwato customary law, thereby imposing it on other peoples in the whole of Botswana. In effect, Schapera did not pay enough attention to other ethnicities in the country. Additionally, it was the legal work written by an anthropologist and therefore lacked the structure and formulations that lawyers were used to.

The influence of the handbook was dominant in the administration of customary law in Botswana, and any restatement of Tswana law must take its point of departure from it.[53] Additionally, Simon Roberts took off from where Schapera left off and began the restatement of law project by examining and restating the family law as practiced by nine tribes in Botswana. Roberts made substantial use of case records in the restatement of law and supplemented the case laws with the information which he obtained from panels of informants.[54] Robert's use of case records in

[50]Isaac Schapera & John L Comaroff, *The Tswana* (London: Routledge Taylor &Francis Group,2015) 112.
[51] *Ibid* at 92.
[52] *Ibid* at 110.
[53] *Ibid* at 112.
[54] Simon Roberts, *Restatement of African Law, Botswana, Twsana Family Law*, vol 5(London: Sweet and Maxwell,1972) 340.

addition to information from the panels should be emulated by law reformers in Ghana. Combining case records and information from panels is imperative. This is because some characteristics of the customary law that are well documented in the records will not emerge in the discussion with informants.

Contrary to Schapera's *Handbook of Tswana Law and Custom,* Roberts' restatement of law constitutes tabulations of the family law of each major chiefdom in Botswana. Due to the large areas of similarity, the respective chapters are somewhat repetitive, but this format promotes its use as a reference. It will be welcomed by students of Tswana culture and administrators of justice in Botswana who now have a rich and precise compendium of Tswana law at their disposal.[55] Being sensitive to sociological implications, Roberts has tried to prevent the perception that the court may apply such a code in the absence of a thorough appreciation of traditional social organization.[56] This is especially true with regards to certain areas of Tswana family law, since the rules associated with agnatic ranking also regulate access to positions of power and wealth and are operated to justify competition for these positions.

Roberts also highlights certain complexities within Tswana law of succession. For example, the fact that Tswana law states that a man's eldest son by his principal wife is the heir does not mean the distribution of property or status is automatic and immutable.[57] On the other hand, other laws allow competition for the status of an heir, and the application of the law in a literal fashion would do violence to traditional political processes. Roberts shows himself to be conscious of such complexities which those who use this volume will also come to realize.[58] Despite the stated

[55] *Ibid* at 200.
[56] Sebastian Poulter, "Restatement of African Law" (1975) 5:1 Tswana Family Law 110-112.
[57] *Ibid* at 111.
[58] *Ibid at* 112.

purpose of the restatement project, the precise codification of laws does not in itself provide either a clear modus operandi for the administrators of justice or applied sociology of the legal system. However, Roberts should be applauded for turning the attention of legal researchers back to African case records. One can only hope that his restatement will soon be translated into the vernacular and made widely available in Botswana.[59]

(IV)Restatements of law in Eswatini (Swaziland)

The restatement of law in Eswatini, formerly known as Swaziland, is peculiar and academically interesting. The Swaziland restatement is one of the restatements prepared for the Restatement of African Law Project of the School of Oriental and African Studies. The objective of the research undertaken was not simply to record the customary law of Swaziland.[60] The objectives of the research was achieved using panels of consultants in Swaziland. The persons consulted were those who were associated with administering the customary law in the Swazi courts of Swaziland.[61] These experts were consulted to discover the content of and how the courts applied the customary law. This process was aided considerably by the fact that Swaziland is relatively homogenous ethnically. It is a small country, and its African population is composed mostly of members of the Swazi nation.[62] Therefore, it was not necessary to subdivide the country into different units as was the case in other countries whose ethnic structure is more diverse and complex.

Local variations were taken into consideration in carrying out this research.[63] However, one of the main objectives of establishing the three smaller panels of consultants was to find out the existence

[59] *Ibid at* 112.
[60] Neville N Rubin, "Swazi Law of Succession: A Restatement" (1965) 9:2 J Afr. L 90-113.
[61] *Ibid* at 94.
[62] *Ibid* at 94.
[63] *Ibid* at 94.

of local variations resulting from historical differences or contiguities with other ethnic groups.[64] This happened to be the case in certain minor instances; for example, in the law of marriage, where some residual Zulu influence was discernible in the law as described by members of the panels set up in the southern part of the country, particularly from the areas surrounding Goedgegun, Hatikulu, and Hiuti. The establishment of these smaller panels also afforded the project the opportunity of having the information provided by the large central panel crosschecked by the smaller panels.[65]

The information put together in the restatement is not however entirely obtained from the panelists. Before embarking on the field visit to Swaziland, a considerable amount of time was spent in London consulting the available written material on Swaziland by anthropologists whether published or unpublished.[66] Again, the materials lodged in the secretariat archives at Mbabane were used for the restatement of law in Swaziland. These materials in addition to the information recorded from the panels were important to achieve the task of restating the law. The written materials, opinions of government officials, law advisers, and even knowledgeable laymen were also instrumental in providing the administrative and conceptual framework within which the rules were being applied.[67] The Law Reformers in Ghana should take a similar approach by engaging law advisers and knowledgeable laymen in drafting a comprehensive restatement of law. Engaging people from all strata of the Ghanaian society will ensure that the law is accepted by the people.

The legal framework concerning the use of customary law is also important. Even in a country like Swaziland where the effects of a modified form of "Indirect rule" is still clearly visible in the legal and administrative structure, it would be of little practical value to ignore the existence and

[64] AJGM Sanders, "The Internal Conflict of Laws of Swaziland" (1986) 19 Comp & Intl LJS Afr 112.
[65] *Ibid* at 112.
[66] *Ibid* at 114.
[67] FPvR Whelpton, "The Indigenous Swazi Law of Succession: A Restatement" (2005) 2005: 4 J SA L 828-841.

influence of the Roman-Dutch law, either in its received or statutory forms, when describing the customary law.[68] Reference has therefore been made to both in the restatement of the Swazi law of succession and intestate succession under the Roman-Dutch law.[69] Although the restatement attempts to formulate a systematic description of the Swazi law of succession, there exists a danger that such description might appear too abstract, or too remote from the actual events giving rise to legal consequences. It therefore became imperative for the researchers to include a certain amount of purely narrative material.[70] Dry as the restatement might be without any of it, there is always the risk that the legally important rules and situations might be swamped in a deluge of sociologically useful, but legally irrelevant, explanation. In cases of uncertainty, an effort is made to include this material in the form of footnotes.[71]

Lastly, the double utility of the outcome of the restatement of Swazi law project is significant to single out. The compilation of the restatement of Swazi law was undertaken as part of an academic research project, but also with an eye to their use in due course in the courts of Swaziland. It is impossible to evaluate the extent to which they will prove helpful in this sense of their use by the courts and academicians.[72] The accurate statement of Swazi customary law at the present, provides a helpful guide to administrative officers, court officials, practitioners, legislators, and litigants when they encounter challenges associated with customary law. It is valid to say that the restatement of the Swazi Law of succession will help to unify the customary law of succession of Swaziland. [73]

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[68] Thierry Verhelst, *Safeguarding African Customary Law: Judicial and Legislative processes for its adaptation and integration* (African Studies Center, University of California, 1968)52.
[69] *Ibid* at 50.
[70] AJGM Sanders, "Comparative Law, Law Reform and the Recording of African Customary Law" (1983) 16 De Jure 321.
[71] *Ibid* at 322.
[72] *Ibid* at 324.
[73] *Ibid* at 324.

6:2 Conclusion

This chapter focuses on four countries: Kenya, Malawi, Botswana, and Eswatini (Swaziland). However, other African countries such as Tanzania and Zambia have also engaged in the restatement of law projects. In Tanzania, for instance, the unified restatement of customary law provides for written and oral wills under customary law and encompasses a common scheme of distribution of an estate.[74] The acknowledged intention of the restatement of law project is to produce works that would be of direct practical value to courts and lawyers in the countries under investigation while at the same time ensuring that proper standards of research are maintained. The restatement of law project will help compile the diverse customary laws in Ghana. This will make its integration with English law feasible. However, Ghana should take note of the challenges faced by other African countries such as Malawi, Kenya, Botswana, and Swaziland (Eswatini) in their restatement of law projects.[75] Pertinent among them is the issue of time and funds. The researcher(s) who would undertake the restatement of law project in Ghana should also endeavour to use records of case laws as in the case of Botswana to expand the scope of their research. One of the recommendations of Cotran is that the restatements of law would be repeatedly amended and may incorporate more case materials in the future. Both volumes try to show the future directions of law either by comparing traditional rules with modern rules or by citing modern developments. This shows that the restatement of law is an ongoing project and must be continually refined to capture the nuances of changing contemporary values and laws. Subjecting the restatement of law to changing contemporary values is feasible in Ghana. The House of Chiefs

[74] Ralph ES Tanner, "The Codification of Customary Law in Tanzania" (1966) 2 E Afr LJ 105.
[75] William Twining, "The Restatement of African Customary Law: A Comment" (1963) 1:2 J. Mod. Afr. Stud. 221-228.

must fulfill its constitutional mandate to evaluate existing customary laws to eliminate outmoded laws and to undertake a progressive study of customary laws.[76]

Finally, the researcher(s) should also translate the volume into vernacular to assist the court and other local users to understand the law effectively.[77]

[76] 1992 Constitution of Ghana, art 272 (b)(c).
[77] *Ibid* at 225.

CHAPTER 7: CONCLUSIONS AND RECOMMENDATIONS

Customary law plays an important role in the lives of Ghanaians. For Ghanaian women, customary law is specifically significant as it defines their identity within society and moderates their family relationships, entitlements, and access to resources. In the area of succession, customary law plays a role in determining women's inheritance rights.[1] However, customary law discriminates against women, especially in a patriarchal society such as Ghana. Laws, including the Repugnancy doctrine, have been implemented to eliminate customary laws that are repugnant to "natural justice, equality, and good conscience." However, the persistent operation of customary law shows their overriding control and dominant force in the family law regime, a force which African governments including Ghana, are slow to tackle.[2] Even in situations where there are laws that entitle women to inherit their husband's property either under a will or upon intestacy, the inheritance is not given to the woman because, in practice, customary rules that determine succession overrule the statutory provisions.[3] Inheritance laws affect every individual in society, especially women, as such the law requires close attention. Therefore, law reform must address the loopholes and inadequacies within the existing inheritance regime. My thesis is mainly concerned with the legislative efforts that Ghana can put in place to circumvent and reduce the serious disability imposed upon a widow by customary law regarding her entitlement to a fair share of her deceased husband's properties. I highlight three important areas which need immediate reform to secure the inheritance rights of women in Ghana. These areas include the plural legal system, the use of judicial precedent and the repugnancy doctrine.

[1] David M Dzidzornu "Human Rights and the Widow's Material Security: The Case of the "Intestate" Ghanaian Widow" (1995) 28:4 Law and Politics in Africa, Asia, and Latin America 489-521.
[2] *Ibid* at 499.
[3] *Ibid* at 499.

7.1 A. Legal Pluralism.

The first challenge to the promotion of women's inheritance rights is that posed by legal pluralism. Ghana is a legally plural state where customary law and the English common law operate side by side. The interaction of the legal systems usually leads to conflicts and competition. The rights and duties of parties under these two legal systems are not the same.[4] The conflict of laws situation in Ghana leads to a choice of law dilemma on the part of judges. Judges are guided by choice of law rules which is also problematic and affects the inheritance rights of women.[5] The conflict of laws in Ghana also leads to forum shopping, where parties can choose the legal system that offers more benefits for them. Women are often disadvantaged as they usually lack the knowledge, resources, and bargaining power needed to promote their rights. These factors may constrain a woman from accessing the formal court, leaving them to resort to the traditional courts, that often discriminate against women.[6] As such, my thesis investigates how legal reformers can reconcile these two legal systems to enhance the inheritance rights of women. I propose a unified law that will reconcile the customary law of succession and the common law. I highlight three schemes through which the unified law can be enacted. The first scheme involves eliminating some of the technicalities of English law. The second scheme involves creating a unified body of customary law, and finally creating an interaction between the state and customary law courts in Ghana.

The first scheme that law reformers in Ghana should address is the technicalities of the English law. Law reformers should address the language, complexities, and procedures of the English

[4] Allot, "Unification of Laws in Africa" (1968) 16 Am J.Com. L 51.
[5] *Ibid* at 60.
[6] *Ibid* at 60.

common law. The language of proceedings is complex, tends to be technical English, and cannot be understood by most Ghanaians.[7] The procedures of English law are complex, cumbersome, and bureaucratic as compared to the procedures of customary law. If English law is to harmonize with customary law, the language of proceedings must be simple and clear. This will enable the traditional courts presided by chiefs, who are most often formally uneducated to understand the procedures and language of the English common law.[8] The chiefs can only infuse principles of equality if they understand the language of the English law.

One challenge of most African countries is to unify their customary laws. Ghana has attempted the codification of customary law. The codification approach failed to work because of the number of ethnic groups in Ghana and the issue of funding.[9] It is worth mentioning that codification also ossifies customary law and prevents it from developing. I will not encourage Ghana, as a developing state, to resort to codification as this will ossify the existing and flexible customary laws. I propose the restatement of law approach for Ghana to unify its customary laws. Restatement of laws are set of laws that brief judges and the lawyers about the general principles of common law. Additionally, the restatement of law approach is also a well-used source of secondary authority that is highly persuasive.[10] This is because it is a comprehensive statement of customary law with extensive input from judges, practicing attorneys, and law professors. Also, when a judge considers a restatement section in a legal brief, it allows the court to make an informed decision as to how to apply it to the case at hand. This is because these restatements accurately restate the already established law.[11] Restatement of law may be in the form of guidelines and manuals made

[7] Kane Minneh, Joseph Oloka-Onyango & Abdul Tejan-Cole, Reassessing Customary Law Systems as a Vehicle for Providing Equitable Access to Justice for the Poor (Arusha Conference: New Frontiers of Social Policy, (2005)10.
[8] *Ibid* at 10.
[9] Bret L Shadle, "Changing Traditions to Meet Current Altering Conditions: Customary Law, Africa Courts and the Rejection of Codification in Kenya" "1930- 60" (1999) 40:3 J Afri Hist 421.
[10] *Ibid* at 424.
[11] *Ibid* at 424.

up of recordings of customary laws. This means customary law is not reduced into codes, allowing for flexibility, certainty, and objectivity.[12] Due to its flexibility, the restatement of law approach will capture the social soul of customary law in Ghana. Judges will apply customary law which reflects contemporary socio-economic changes and the underlying principles of customary law.Without a written form of customary law, it is easy to understand why the process of constituting a unified law in Ghana is not considered important or ongoing.[13] Even if it is not for the process of a unified law, customary law needs to be reduced to writing in the form of restatement manuals for many reasons, including an important one of making customary law a matter of law and not a matter of fact.[14]

Other countries have used this approach to unify their customary laws.[15] I cite Kenya, Malawi, Botswana, and Swaziland as countries that have a comprehensive statement of customary laws which has been integrated with the common law. In countries such as Kenya, these restatements have also assisted the court in determining the content of customary law in succession cases. This approach will help Ghana create a written body of customary law that can integrate with the English common law. The restatements of law will also assist the court in determining the content of customary laws of succession in Ghana.[16] It is also worth highlighting that the restatement of law approach is a slow process and not cheap. The recording and publication of the restatement of law project in Kenya began in 1961. It took seven and eight years respectively for volumes 1 and

[12] Azinge Epiphany, "Codification of Customary Law: A Mission Impossible"? In: Y Osinbajo & Kalu AU, *Towards a Restatement of Customary Law* (Lagos: Federal Ministry of Justice,1991) 289.
[13]Ennyinna S Nwauche, "The Constitutional Challenge of the Interaction and Integration of Customary and Received Common Law in Nigeria and Ghana" (2010) 25 Tul Eur & Civ LF 62.
[14]*Ibid* at 64.
[15] *Ibid* at 64.
[16] Janine Ubink, "The Quest for Customary Law in Africa State Courts" in Jean Marie Fenrich et al, eds, *The Future of African Customary Law* (Cambridge University Press,2011) 263.

2 to be completed.[17] Ghana should therefore note that the project is time-consuming, and it should be financially equipped before starting the restatement of law project. The major challenge for Ghana is the issue of funding the restatement of law project. The second phase of the Ascertainment and Codification of Customary Law Project was halted due to the issues of funding. Therefore, if Ghana wants to undertake the restatement of law project, I recommend the Law Reform Commission and the National House of Chiefs to write a comprehensive proposal to solicit for funds from international organisations that want to invest in such a project.

The formal courts and traditional court should interact to promote the inheritance rights of women. The interaction between the two courts will also reconcile state and customary laws in Ghana. The traditional courts should infuse principles of equality and non-discrimination in their interpretation of customary law.[18] I propose that formal court lawyers and judges can educate traditional rulers about state law and human rights imperatives. Likewise, lawyers and judges of the formal court can learn the foundational values of customary law. Both the formal and traditional courts should increase the quota of women judges on the courts. The involvement of more women in these courts will be a step toward ensuring that female litigants obtain a fair share of their inheritance rights. This will allow the courts to interpret customary law better and give a fair judgment in the distribution of intestate property. Creating an interaction between the formal and traditional courts systems will address the injustices women face within the inheritance regime in Ghana.[19] I cite examples of other countries that have unified their court systems. Kenya is one of such countries. The interaction between the traditional and state court systems in Kenya was initiated with the aim

[17] *Ibid* at 210.
[18] *Ibid* at 210.
[19] Winifred Kamau, *Customary Law, and Women's Rights in Kenya* (2011)36.

that all laws, customary law included, would be officially promulgated as codes.[20] The draftsmen of the Kenyan law held that a unified court system would enhance the rights of women and promote political unity amid the political party conflict present in the immediate post-independent period. Similarly, in Zimbabwe, the customary courts set up under the colonial administration were not eliminated. Rather, the new government enacted the *Customary Law and Primary Court Act* to promote their operation.[21] The legislature later amended the bill to the Customary Law and Local Court Bill to streamline the activities of the customary law courts and bring them in conformity with modern principles of law and administration of justice. Likewise, in Uganda, Local Council Courts initially set up at the community level are recently officially incorporated into the formal legal system by legislation.[22]

Also, in the Solomon Islands, current Native Courts were set up by statute in 1942 to resolve the conflict between parties living in the area where the courts are situated. Parties can seek an appeal from the local Courts to either the Magistrates' Court or the Customary Land Appeals Court in cases of land conflicts. Even though the local Courts apply customary law, their rules and procedure are modeled on western courts.[23] Legal reformers should put in place these three schemes in Ghana to create a unified law that will address the conflict of laws problems faced by the judiciary.

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[20] Lawrence Juma, "Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Process" (2002) 14:31 St Thomas L Rev 459.
[21] *Ibid.*
[22] Kane Minneh, Joseph Oloka- Onyango & Abdul Tejan-Cole, Reassessing Customary Law Systems as a Vehicle for Providing Equitable access to Justice for the Poor (New Frontiers of Social Policy Conference delivered at Arusha, December 2005) 6-8.
[23] *Ibid* at 8.

B. The Doctrine of Judicial Precedent

The second challenge that hinders equal inheritance for women is the application of judicial precedent. Judicial customary law, which are precedents of customary law cases applied in the Ghanaian courts, is static and no longer ensures equality in the inheritance regime, as it contains old inheritance practices that continue to favour men.[24] I argue that the court has a role in ensuring that judicial customary law is reformed and developed to address the inequality women face regarding inheritance rights. First, the courts need to overcome judicial passivity and hold a progressive view of customary law, especially towards customs and traditions that perpetuate the discrimination women face in claiming their inheritance rights.[25] The court should consider socio-economic changes in Ghanaian society, including women's current contribution toward the acquisition and maintenance of matrimonial property. The court should declare customary laws of succession that discriminate against women unconstitutional**.**

Judges and Magistrates should use several interpretative tools to ensure the reform of customary law. For example, judges should use constitutional principles of gender equality, non-discrimination, and affirmative action. The court should also refer to international human rights conventions such as the *Convention on the Elimination of All Forms of Discrimination against Women* and the *African Women's Rights Protocol*.[26] Judges can decide to rely on empirical evidence of changing customary practices that reflect living law instead of judicial customary law, which is static and not dynamic. Judges can effectively play this role if given some form of

[24]Anthony Diala, "A Critique of the Judicial Attitude Towards Matrimonial Property Rights Under Customary Law in Nigeria's Southern States" (2018) 18 :1 Afri HR LJ 108.
[25]Muna Ndulo, African Customary Law, Customs and Women's Rights (2011) 18: 1 Ind. J Global Legal Studies 102.
[26] *Ibid* at 102.

intersectional gender training which will recognize culture in the lives of women.[27] For example, some commendable efforts have already been made in Kenya through the Jurisprudence of Equality Programme (JEP) led by the Kenya Women Judges Association (KWJA), where several Kenyan judges and magistrates have obtained gender training.[28] The Judicial Service Commission is mandated under the Constitution of 2010 to prepare and implement programs for the continuing education and training of judges and judicial officers. The Commission has the ultimate function of advancing gender equality. These laws offer ample scope for courts to be trained on gender issues which can assist judges to make the right decisions concerning human rights.[29]

It is worth highlighting that the Ghana chapter of the International Association of Women Judges (GHIAWJ) has taken up a similar initiative to train judges to be gender sensitive. The chief Justice in addressing the group of female judges, stated that "the group is intended to equip us so that we can help to eliminate these stereotypical ideas, beliefs, and values that could promote gender discrimination and remove obstacles to women and children's access to justice".[30] The Chief Justice extended an invitation to male judges to join the association and form partnerships with women to meet the aims and objectives of the association which is to promote gender equality. The association has educated members on gender issues including domestic violence and human trafficking.[31] I recommend that judges also receive adequate training on women's inheritance as several women are facing discrimination in this area. Judges should also be trained to apply an

[27] *Ibid* at 102.
[28] *Ibid* at 102.
[29] *Ibid* at 102.
[30] Josephine Dawuni, "Ghana: The Paradox of Judicial Stagnation" in Bauer Gretchen & Josephine Dawuni, eds, *Gender and the Judiciary in Africa*: From Obscurity to Parity?" (New York: Routledge Press, 2015) 13.
[31] *Ibid* at 10.

intersectional approach in making decisions. The establishment of the association will go a long way in educating judges of the court particularly to be more responsive to the needs of women.[32] The National House of Chiefs has a role to play in supporting the court in implementing customary law in line with socio-economic changes. The chiefs should address and resolve chieftaincy disputes that prevent them from performing their Constitutional mandate which is to conduct research on current customary laws and provide a unified body of customary law. Researchers can also assist the courts by researching living customary law to ascertain credible empirical evidence on evolving customary practices, especially on issues concerning gender.[33] This research can be published in the form of *Restatements* and used by the courts as proof in court by legal practitioners and women's rights groups involved in strategic litigation such as the constitutional challenges of customary practices.[34]

I recommend strongly that Ghana establishes a National Customary Law Development Centre where research on customary law will be carried out. Reference materials on customary law can be kept in the centre to enable the court and other interested groups to get access to customary law. Funding has always been a major challenge for Ghana in the ascertainment of customary law.[35] South Sudan received assistance from the United Nations Development Programme (UNDP) and funding from the government of Canada's Department of Foreign Affairs and International Trade (DFAIT) in establishing the National Customary Law Center.[36] Ghana's Ministry of Justice can solicit funds from international organizations that are interested in providing financial assistance for such a project.

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[32] *Ibid* at 10.
[33]Kamau, *supra* note 19 at 39.
[34] *Ibid* at 39.
[35] Leigh Toomey, Toomey, "A Delicate Balance between: Building Complementary Customary and State Systems" (2010) 3: 1 Law and Development Review 78.
[36] *Ibid* at 78.

Finally, I suggest redesigning legal education and changing the legal theoretical paradigm within which law is taught in Ghana. This will entail including living customary law in the legal education.[37] Living customary law, customary law which is dynamic and responds to transformational forces of society should be incorporated into the curriculum of law faculties or law schools. It should be taught at appropriate levels of the law degree that will allow students to understand the importance and complexity of the subject within the constitutional frameworks of African countries.[38] Future lawyers and judges should have a thorough comprehension of significant elements of living customary law. This includes understanding the conceptualization and methodology of living customary law.[39] Additionally, it is crucial for law schools to train law students to acquire empirical research skills to bring to bear these underlying principles of customary law.[40]

It is also imperative for law schools in Ghana to incorporate an interdisciplinary approach in the teaching of customary law. Law professors should draw knowledge from other fields such as economics, sociology, and political science, as lawyers ought to at least have some knowledge about these fields.[41] Applying knowledge from other fields of study in the teaching of customary law would bring out the historical forces that shaped and still shape the formation of customary law. When students have adequate knowledge of legal history, it will enable them to understand the development of concepts such as legal positivism, individual rights, etc.[42] Understanding these

[37] Chuma Himonga and Fatima Diallo, "Decolonization and Teaching Law in Africa with Specific Reference to Living Customary Law" (2017) 20:1 Potchefstroom Electronic Law Journal 1-19.
[38] *Ibid* at 3.
[39] *Ibid* at 7.
[40] *Ibid* at 9.
[41] *Ibid* at 9.
[42] *Ibid at 17.*

concepts is imperative for students to know why and when laws are outdated and should be changed.[43] This will protect the inheritance rights of women as the court will implement living customary law, which reflects the current contributions women make in the acquisition, maintenance and improvement of matrimonial property.

If not given the right tutelage concerning customary law, future lawyers and judges will not have the right lens through which to view customary law.[44] Judges will not understand the underlying principles of customary law which constantly changes to suit situations. Understanding and incorporating these foundational values in the interpretation of customary law will address the social realities within which people live their lives and the changes made to their laws.[45] Judges in South Africa have shown exceptional readiness to move beyond the influence of the dominant means of their legal education to accept concepts of law such as living customary law existing in African legal pluralistic theoretical frameworks.[46] According to Cousins, courts in South Africa have acknowledged that "the underlying values of customary law inform the living law which constantly adapts to changing social practice."[47] This is worthy of emulation by the Ghanaian judiciary.

C. The Repugnancy Doctrine

The third challenge that hinders equality in the inheritance regime is the application of the doctrine of repugnancy. My thesis investigates the contemporary relevance of the repugnancy doctrine and

[43] *Ibid* at 17.
[44] *Ibid* at 17.
[45] *Ibid* at 17.
[46] Chuma Himonga and Craig Bosch, "The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning" (2000) 117 S Afri LJ 306.
[47] Ben Cousins, "Contextualising the Controversies: Dilemmas of Communal Tenure Reform in Post-Apartheid South Africa"' in Annika Claassens, A& and Ben Cousins, B, eds, *Land, Power & Custom: Controversies generated by South Africa's Communal Land Rights Act* (Cape Town: Juta and Company Ltd,2008) 25.

its effects on the inheritance rights of women. The undefined scope of the repugnancy doctrine has resulted in uncertainty in the application of the customary law of succession. Depending on a judge's understanding of the principles of natural justice, equity, and good conscience, a judge rejects or accepts a customary law of succession.[48] This means that a judge uses their own discretion to determine which customary law to apply and which customary law to reject. The judge may accept discriminatory customary law of succession depending on their understanding of the repugnancy doctrine. This does not guarantee an equal inheritance for women.[49] I argue that Ghanaian women cannot continue to rely on legislation that does not guarantee equality. Judges should set aside the repugnancy doctrine as it no longer has contemporary relevance in the inheritance regime. The judiciary should develop concrete and equitable standards in interpreting and applying customary law.[50] Ghanaian courts should use living customary law and constitutional provisions to assess judicial customary law. Living customary law contains foundational values that are flexible and reflect socio-economic changes. Additionally, the courts should use constitutional provisions to ensure equal inheritance rights for women.[51] The Constitution has equality and non-discrimination provisions such as Article 22(1) and Article 39(2). Article 39(2) stipulates that "the state shall ensure that appropriate customary and cultural values are adapted and developed as an integral part of the growing needs of the society as a whole; and in particular that traditional practices which are injurious to the health and well-being of the person are

[48] Nwauche, *supra* note 13 at 61.
[49] *Ibid* at 61.
[50] *Ibid* at 61.
[51] *Ibid* at 61.

abolished." [52] Also, Article 22(1) states that upon the death of one spouse, the surviving spouse can claim a reasonable share of the estate whether or not she was the beneficiary under a will.[53]

Judges can use these two provisions in the application of customary laws of succession. The court should abolish, modify, and reinterpret any customary law of succession which violates Article 22(1) and Article 39(2) to safeguard the inheritance rights of women. Parliament should amend the word "reasonable share" in article 22(1) by enacting a law that provides 50% or more of the estates of the deceased to the widow depending on her contribution towards the acquisition and maintenance of matrimonial property. I propose that the courts should consider the financial and non-monetary contribution of women to measure their contribution towards the acquisition of matrimonial property. Non-monetary and monetary contribution should be accorded the same weight.[54] This is because some women perform domestic duties including taking care of the children and discharging household duties. These domestic duties allow the men to go out to work and save the money, they earn to acquire properties. Therefore, the judiciary should consider the financial and non-financial contribution of women in the distribution of intestate property.[55]

7. 2 The Role of Other Institutions

There are other institutions that play important roles in promoting equal inheritance rights for women. These institutions include the parliament of Ghana, non-governmental organisations, religious bodies, and the media.

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[52] 1992 Constitution of Ghana, art 39(2).
[53] *Ibid* at art 22(1).
[54] CEDAW Committee Recommendation no.21 (2004) Comment 32. According to the statement of the CEDAW Committee on matrimonial property, in some countries, greater emphasis is placed on financial contributions in the distribution of matrimonial property other than non-financial contributions. Recommendation of the Committee is for States parties to give same weight to financial and non-financial contributions in the distribution of matrimonial property.
[55] 1992 Constitution of Ghana, art 22(1).

A. The Role of the Parliament of Ghana

In the case of Ghana, the contribution of the legislature cannot be underestimated. The Judiciary can effectively perform its functions of interpreting the law when parliament effectively performs its legislative functions. The parliament of Ghana should enact a unified legislation that harmonizes both English law and customary law to regulate the property rights of spouses.[56] This will provide equality and fairness for women in the distribution of intestate property. Until parliament enacts a unified law, legal subjects cannot effectively rely on the existing legal framework to claim a fair share of their inheritance. The courts will continue to rely on existing judicial precedents and choice of law rules to make judgments that discriminate against women.[57]

According to Justice Ocran of the Supreme Court of Ghana, "national judiciaries with a common law background start with an uphill task in the application of international law: the dualist position bequeathed to us by our colonial masters still sticks to us like an albatross around our necks."[58] Ghana should break away from the inherited strict dualism. The legislative domestication of international conventions will promote the effective implementation of human rights in Ghana. Ghana can emulate countries such as Malawi, South Africa, and Kenya that have incorporated international conventions into their domestic laws.

However, international human rights law will not be fully accepted by Ghanaians if it does not resonate with customary laws. I recommend the "vernacularization" of human rights. Human

[56] *Ibid* at art 22(2).
[57] Olympia Twenewaa Ahenkorah, Matrimonial Property Rights of Women upon Divorce in Ghana, Under the Prism of Legal Empowerment: To Which Extent does the Lack of Substantive Legislation on Property Settlement upon Divorce Constitute a Breach of the CEDAW? (Master's Thesis, University of Oslo,2013)38.
[58] M Ocran, "Access to Global Jurisprudence and Problems in the Domestic Application of International Legal Norms". Keynote address at the 2nd West African Judicial Colloquium, 8th October,2007, Accra, Ghana.

rights can be translated into local terms with the assistance of intermediaries such as non-governmental organisations and traditional rulers.

B. The Role of Non-Governmental Organisations

Additionally, non-governmental organisations should educate the people on the need to promote equal inheritance rights for women. Laws are instruments that will help us achieve our objectives, but unless we change the people's mindsets, we will not succeed in addressing the discrimination women face.[59] Women's rights groups, non-governmental organisations, and community-based organizations have an important role in the processes of lobbying for law reform, raising public awareness, and educating the public about the laws. Most Ghanaians are ignorant of the law and the rights they are entitled to under the law. If the laws are to make a great impact on the people, it is prudent to establish extensive educational as well as legal aid programs.[60]

Legal literacy is an essential tool for the empowerment of women because it offers important information that permits women to exercise their rights through avenues of legal assistance and action. Non-governmental organizations are indispensable agents in advancing the rights of the vulnerable in society. The continued efforts of these non-governmental organizations will enhance the inheritance rights of women through legal literacy programs, which will reduce the high rate of discrimination women face.[61] Commendable efforts have already been started by NGOs in Ghana, such as Women in Law and Development (WILDAF), Ghana and the International Federation of Women Lawyers (FIDA), Ghana. These non-governmental organisations organize

[59]Jean Marie Fenrich & Tracy Higgins, "Promise Unfulfilled: Law, Culture and Women's Inheritance Rights in Ghana" (2001) 25:2 Fordham Int LJ 259.
[60] Reginald Akujobi Onuoha, "Discriminatory Property Inheritance under Customary Law in Nigeria: NGOs to the Rescue" (2008) 10:2 International J not-for-Profit L 79.
[61] *Ibid* at 259.

educational programs throughout the country to create awareness of the dangers of some discriminatory cultural practices.[62] The International Federation of Women Lawyers, Ghana promotes the education of women on their rights through workshops, free legal services, and translations. Each year FIDA organizes Legal Aid Clinics in the various regions of the country. The organization provides free legal aid, arbitration, and representation in court for women who are not financially capable of hiring the services of a lawyer.[63]

Women in Law and Development in Africa has introduced the Legal Awareness Programme (LAP), which promotes rights awareness and legal counseling services. One notable feature of WILDAF is that it recognizes the need to find opportunities to reconcile both state law and customary law to eliminate barriers to access to justice for women.[64] Finally, the Network for Women's Rights in Ghana (NETRIGHT) is a group of civil society organizations and individuals which aims to promote justice for women. In 2008, NETRIGHT, after conducting several deliberations with women's groups on a national level, provided several suggestions for the government to provide for equal access to ownership of properties and to implement national policies that promote gender equality effectively.[65]

I also recommend that non-governmental organisations use home-grown solutions to promote women's inheritance rights in Ghana. These non-governmental organisations can play a key role in the "vernacularization" or "indigenization" of international human rights in the local context.[66] They can put universal human rights ideas into known symbolic terms and employ stories of local

[62] *Ibid* at 300.
[63] *Ibid* at 301.
[64] *Ibid* at 301.
[65] *Ibid* at 301.
[66] Sally Engle Merry, "Transnational Human Rights and Local Activism: Mapping the Middle" (2006) 108:1 American Anthropologist 41.

injustices and abuse to give life and power to international movements.[67] They can reformulate local grievances by presenting them as human rights abuses and interpret universal ideas and practices as ways of addressing specific local problems.[68] In a nutshell, they can reinterpret transnational ideas in local terms, and simultaneously they reinterpret local ideas and challenges in the language of international human rights.

Translators can find these home-grown remedies by critically studying the socio-cultural context within which human rights are violated.[69] In applying these home-grown solutions, the translators only rely on local values and beliefs rather than incorporating western concepts. In Africa, religion provides an essential receptor for human rights. According to a study carried into the human rights culture of the Akans in Ghana, religion plays an essential role in everyday life, and it has a primary effect on their human relations.[70] Like other Africans, the Akans are encouraged to be good to each other as they strongly believe that it is the preeminent way to express the will of God in their everyday life. The Akan society is a society where religion and everyday social actions are linked together to the extent that all significant actions should comply with the will of God. According to Danquah, among the Akans:

> True culture is ethical, not material. Hence, among the Akans, the 'tool' of their civilization is almost indiscoverable: it is with them, a matter of spirit. Everything else has value only in its relation to the ideal of God as the 'tool' of their culture. Here, all are for each; for all are of the ancestor of the family, be he a Chief or Emperor, or merely a patriarch. In the end we will find that the quest for God in Akan land is a quest of their culture, their politics, their economics, and the spirit of their art and life. [71]

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[67] *Ibid* at 43.
[68] *Ibid* at 43.
[69] Tom Zwart, "Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach" (2012) 34: 2 Hum Rts Q 546.
[70] *Ibid* at 546.
[71] Joseph B Danquah, *The Akan Doctrine of God* (Lutterworth: London,1944)3-4.

As such, within the Akan community, human rights culture has a strong religious foundation.[72] The significance of religion as a means to champion universal human rights is usually overlooked or ignored by Westerners because of their point of view that religion should be separated from the state and the opinion that universal human rights must assist a modernization agenda.[73] Improvements in the field of universal human rights can be promoted by relying on religion and the beliefs of the people. For example, in succession, the Akan ethnic group and other ethnic groups who share similar religious beliefs must be encouraged to provide for the maintenance and basic needs of the widows and their children, which resonates with their religious beliefs to do good for each other. It is believed that doing good to another person translates into doing good to oneself.[74] There is an Akan Adage that says, "woye bone a woye fa, wo ye papa a wo ye fa," meaning if you do good, you do it for yourself, if you do bad, you do it for yourself.[75] Non-governmental organisations can appeal to the existing culture and religious beliefs of the people to promote human rights. According to An-Naim, "people are more likely to observe normative propositions if they believe them to be sanctioned by their own cultural traditions, observance of human rights standards can be improved through the enhancement of the cultural legitimacy of those standards."[76]

C. Religious Bodies

In addition to these traditional institutions, it is also vital to engage religious bodies. As already mentioned, religion is one way of promoting human rights in Africa. Religion plays an

[72] Richard Amoako-Baah, *Human Rights in Africa: The Conflict of Implementation* (PhD Dissertations: University of Tennessee,1999) 192.
[73] *Ibid* at 185.
[74] *Ibid* at 185.
[75] *Ibid* at 185.
[76] Ahmed Abdullahi An Naim, *Human Rights in Cross Cultural Perspectives* (Philadelphia: University of Pennsylvania Press,1990) 20.

instrumental role in the lives of most Ghanaians and influences the decisions they make. In Ghana, Christianity is the dominant religion (71%), with about 18% practicing Islam, 5% practising traditional religion, and 6% adhering to other religions.[77] Research has shown that, theological misinterpretation of main religious literature such as the Bible has promoted years of injustice and inequality in Africa and has denied women their rights.[78] People have misinterpreted some biblical texts and used the scriptures to justify the injustice and inequality against women. Religious leaders often quote selected scriptures to support female inferiority and sustain the patriarchal system which discriminates against women.[79] However, I also argue that there are significant religious teachings, particularly Christian precepts that are supportive of women's rights.[80] Religious leaders should therefore use some of these religious teachings to advocate for women's inheritance rights. Religious bodies need to be dynamic, gender-sensitive, and use certain religious values which resonate with the people to promote gender equality. It is important to consult with religious leaders and religious bodies such as the pastors, Imams (head of Muslim groups), Ghana Christian Council, and traditional religious leaders to educate women on their inheritance rights, formal laws, and the right institutions to seek legal redress.[81] These religious leaders can advise their members to stop physically and emotionally abusing the widow and children but rather consider the welfare of the surviving widow and children by giving them their inheritance. They can also

[77] Eric Y Tenkorang et al, "Factors influencing Domestic Violence and Marital Violence against Women in Ghana" 28: 8 Journal of Family Violence 12, see also Office of International Religious Freedom,2020 Report on International Religious Freedom: Ghana (U S Department of State, 2021).

[78] Ani Casimir, Matthew C Chukwuelobe & Collins Ugwu, "The Church and Gender Equality in Africa: Questioning Culture and the Theological Paradigm on Women Oppression" (2014) 4:2 Open Journal of Philosophy 8.

[79] Scriptures such as Ephesians 5:21-33- "wives submit to your own husbands as to the lord, for the husband is the head of the wife and as the church is subject to Christ, let the wife be subject to the husband in everything." Colossians 3:18 are often quoted and misinterpreted to promote inequality and injustice and to enforce female inferiority.

[80] Certain Bible scriptures such as "Love thy neighbour as thyself" and "Do unto others as you want to be done to you" are biblical scriptures that can be used by Christian leaders to champion the inheritance rights of women.

[81] Rose Korang-Okrah & Wendy Haight, "Ghanaian (Akan) Women's Experiences of Widowhood and Property Rights Violations: An Ethnographic Inquiry" (2015) 14:2 Qualitative Social Work 224-241.

advise men to make a will before their demise to protect the inheritance rights of their wives and children.[82]

D. The media

The media has a role in sensitizing and educating the public about women's right to inherit their deceased husbands' estates.[83] The print and electronic media should educate the public not to forcibly take the property of the deceased leaving the widow and children destitute and homeless. Through the diverse social media platforms, the media can also educate women on formal laws and the right institutions to seek legal redress in cases of discrimination.[84] I also recommend that the press should bring the injustices women experience in the inheritance system to the attention of the public. The press should also draw the attention of public on the need for legal reforms especially those laws that are outmoded and no longer relevant in Ghana. The press should work in collaboration with policymakers, traditional authorities, including the chiefs and queen mothers and religious leaders, to enforce workable, practical laws that can change the lives of widows and their children.

7.3 Maintenance under Customary law

This thesis advocates for the court to use a unified succession law to ensure an equal and fair distribution in the inheritance regime. However, some women especially those in rural areas, would continue to adhere to the customary law system even if a robust unified law is enacted.[85] For women who still use the customary law courts in rural areas to receive a fair share of their

[82] *Ibid* at 224.
[83] *Ibid* at 230.
[84] *Ibid* at 230.
[85] Jean Marie Fenrich & Tracy E Higgins, "Promise Unfulfilled: Law, Culture, and Women's Inheritance Rights in Ghana" (2001) 25 Fordham Int'l LJ 259.

inheritance, it is imperative to ensure that the maintenance system is effective. The maintenance system can only be effective if customary heirs are made accountable. For example, the Kwa-Zulu Natal tribes practice male primogeniture; however, widows are still entitled to maintenance from the deceased husband's properties.[86] The successor must deliberate with the widow before the sale of an estate within the deceased husband's properties. The deliberation is required by African customary law in many Kwa-Zulu tribes.[87] The male successor cannot merely overlook what the widow says because he must satisfy the widow's basic needs. This indicates that even though the male successor has legal ownership over a deceased's property, important consultation with the widow(s) must occur concerning the matters of the property. The customary successors must accept the opinions of the widow(s) and provide for the basic needs of the widow and her children.[88]

The enforcement of the system of maintenance under customary law in Ghana is weak and ineffective.[89] The traditional courts in local communities must ensure that customary successors are held accountable for the estates of the deceased. I suggest that the traditional court should make sure that customary successors sign an agreement that will bind them to perform their customary law obligations, which is to maintain the widow and children. Furthermore, customary successors must periodically prove that they are providing for the basic needs of widows and their children. The courts must fine customary successors who fail to comply with agreements of maintenance orders. If the maintenance system under customary law is effectively regulated, widows and their children will not be rendered destitute and homeless.

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[86] J C Bekker, NJJ Olivier & WH Olivier, *Indigenous Law* (Butterworths, Durban,1995) 161.
[87] *Ibid* at 161.
[88] *Ibid a*t 161.
[89] Ekow WC Daniels, *Problems in the Law Relating to the Maintenance and Support of Wives and Children* (University of Ghana: Institute of African Studies, 1974) 288.

7.4 Customary law will, and Statutory law will

My final recommendation is to encourage people to make wills. This will prevent circumstances whereby the customary law of succession will regulate their properties.[90] In addition, it will prevent the conflict between the nuclear family and the extended family of the deceased.

A person can distribute his property in a manner and in any proportion that he deems appropriate to any person of his choice if it is stated in his will. In Ghana, two types of wills are recognized; the will made according to customary law called the "samansiw," and that made according to English law.[91] Both wills are valid if they meet the specified requirements. The customary law will, "samansiw," is usually made orally. The "samansiw" is accepted in some parts of Ghana, usually among the Asantes, Fantes, and other Matrilineal Akan communities.[92] In Ghana, for the court to accept the customary law will, the will must meet essential formal requirements.[93] These requirements include the following:

1. The disposition must be made in the presence of witnesses, who must hear what the declaration is and must know its contents.[94]

2. The member of the family who would have succeeded the person making the will, had the latter died intestate, must be among the witnesses in whose presence the declaration is made.[95]

3. There must be an acceptance, by or on behalf of the beneficiaries indicated by the giving and receiving of "drinks."[96]

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[90] Babatunde Adetunji Oni, "Discriminatory Property Inheritance Rights Under the Yoruba and Igbo Customary Law in Nigeria: The Need for Reforms" (2014) 19:2 Journal of Humanities & Social Sciences 30-34.
[91] Fenrich & Higgins, *supra* note 85 at 293.
[92] Anselmus KP Kludze, "The Formalities of the Customary Law Will" (1975) 12: 1 U Ghana L J 45.
[93] *Summey v Yohuno (1960) GLR 68 at 71;* see also *Abadoo v Awotwi* (1973) 1 GLR 393.
[94] *Ibid.*
[95] *Ibid.*
[96] *Ibid.*

Individuals can also opt for a will in accordance with the English law. A person of or above the age of eighteen years may in writing and in accordance with the Wills Act, make a will disposing of the property. An individual may put his will for safe custody in the High Court, which is sealed up under the seal of that person and the seal of the court[97]

I highly recommend Ghanaians to make wills before their demise. It is important to highlight a few reasons why most Ghanaians do not make wills and suggestions to address these challenges. First, most men in Ghana are unwilling to write wills because of the conception that will writing is not cultural. Most men in Ghana have a conception that making a will might hinder their families from remaining together after their demise. Ghanaian men have lots of reverence for the cultural wisdom of their families.[98] They usually believe that even if they do not write wills, head of families and customary successors can sustain their families after their demise.

Secondly, some Ghanaian men are reluctant to make wills because of the fear of having their lives shortened. Most men believe that if they make a will, they will die early.[99] This is a misconception that should be changed. These misconceptions towards the making of a will demands that Ghanaians receive education. The Government can collaborate with the National Commission on Civic Education (NCCE) to organize public campaigns that will educate the public on the importance of making a will. It is important to change the mindset of men that making a will leads to early death. On the other hand, making a will reduces the conflict between wives and the

[97] Wills Act 1971(Act 360), s 11.
[98] Johnson Oluwole Ayodele, "Gender Victimization: A Study of Widowhood Practices Among Ogu People of Lagos" (2014) 4:3 Sage Open 6.
[99]Spektra Global, "Do You Know About Willls" < http://spektra.global// do-you-know-about-wills>.

extended family over estates. Public education on the making of a will is an important initiative towards improving the inheritance rights of women in Ghana.

BIBLIOGRAPHY

LEGISLATIONS

African Charter on Human and Peoples' Rights adopted in 1981 and entered into force in 1986.

Black Administration Act 38 of 1927.

Chieftaincy Act,2008(Act 759).

Constitution,1996 (South Africa).

The Court Act 1993, (Act 459), (Laws of Ghana (Rev.Ed.2004), Vol 111,1351).

Convention on the Elimination of All Forms of Discrimination against Women adopted in 1979 and entered into force in 1981.

Evidence Act,1975 (NRCD 323).

Family Property Act, SS 1997.

Family Law Act, SBC 2011.

Ghana Customary Marriage and Divorce Law,1991.

Law Reform Commission Act,2011 (ACT 822).

Law of Evidence Amendment Act 45 of 1998.

Law of Succession Act, 1981 (Cap. 160).

Maputo protocol adopted 2003 and entered into force in November 2005.

Native Courts Ordinance 5 of 1883.

Traditional Court Bill of Traditional Courts,2017.

Wills Act, 1971 (Act 360).

JURISPRUDENCE

Allotey (Decd) In Re Allotey v Otoo (1981) GLR 393 & *Quaye & Ors v Quarcoo & Anor* (1991) 2 GLR 437.

Alexkor Limited v Richtersveld Community 2003 (12) BCLR 1301(CC).

Abadoo v Awotwi (1973) 1 GLR 393.

Asare & Another v Ga West District Assembly & Another (2009) AHRLR 343.

Adongo v Adongo & Others (2006) eKLR.

Adom & Another v Kwarley (1962) 1 GLR 112.

Akrofi v Akrofi (1965) GLR 13.

Amissah v Krabah (1936)2 W.A.C.A 30(P C).

Angu v Attah, (1916) Gold Coast Privy Council Judgements, (1874-1928).

Barnes v Mayan (1871) Sar FCL 180 AT 181.

*Bhe v Magistrate, Khayelitsha 2*005 (1) BCLR 1 (CC) (2004) (S Afr).

Becker v Petkus (1980) 2 S.C.R 834.

Boham v Marshall (1892) Sar FCL 193 AT 194.

Case v Ruguru (1970) E A 55.

Chouinard v O'Connor 2011 BCCA 121 (CAN LII).

Daniels v Campbell NO & Others 2004 (5) SA 331 CC.

David Tchakokam v Keou Magdaleine (Suit No. HCK/AE/K38/97/32/92:1999).

Doutst v Schatz 2002 SKCA 129,227 Sask R 1 (14).

Estates of Agboruja (1949) 19 NLR 38.

Estate of Duncan Kiiru Karuku Succession No.74 of 1987.

Estate of Benson Ndirangu (2018) eKLR.

Estate of Benson Ndirangu Mathenge Succession Cause 231 of 1998.

Ejidioh Njiru Mbinga v Mary Muthoni Mbinga & Another (2006) eKLR.

Estate of Lerionka Ole Ntutu (2008) eKLR.

The *Estate of Kiguta Mukel alias Kiguta Mukli (*2013) eKLR.

Esther Kudzordzie v Major Nelson Agbeko (2010) JELR 69580 (HC).

Ennin v Prah 1959 JELR 65457 (HC).

Fynn v Gardiner (1953) 14 W.A.CA. 260.

Ghamson v Wobill (1947) 12 WACA 181.

Gyamaah v Buor (1962) 1 GLR 196.

G AD v B C Children's Hospital 2003 BCSC 443 (2003) BCJ No.654.

Govender v Ragavayah NO& Others (6715/08) (2008) ZAKZHC 86.

Gory v Colver 2007(4) SA 97 CC.

Government of RSA and others v Grootboom and others (CCT11/00) (2000) ZACC 19.

Kelln v Walker 2002 SKQB 360, 33 RFL (5^{TH}) 91 (3).

Kachingwe and ors v Minister of Home Affairs and Commissioner of Police No SC 145/04; ILDC 722 (*ZW 2005).*

Lewis v Bankole (1908) 1 NLR 83.

Loromekoe v Nkegho (1957) 3 WALR 306.

Mary Gichuru v Esther Gachuhi Civil Appeal N0.76 of 1998.

*Mahlangu and Another v Minister of Labour and Others (*2020) ZACC 24.

Mikateko Joyce Maluleke & Thuli Madonsela, *Gender Equality Jurisprudence in Landmark Court Decisions* (South Africa,2004).

Mwathi v Mwathi (1995-98) E.A 229.

Mojekwu v Mojekwu (1997) 7 NWLR 283.

New Patriotic Party v Inspector General of Police (1993-94) 2 GLR 459.

Newton v Crouch 2016 BCCA 115 (20).

Ocansey and Another v The Electoral Commission and Another (2010) 26.

Quartey v Martey (1959) GLR 380.

Quaicoe v Fosu (1965) GLR 145

Re Whyte (1946) 18 NLR 70.

Sackeyfio v Tagoe (1945) 11 W.A.C. A 73.

Summey v Yohuno (1960) GLR 68 at 71.

Ukeje v Ukeje (2014) 11 NWLR 384.

Wambugi w/o Gatimu v Stephen Nyaga Kimani (1992) K A R 292 (CA).

SECONDARY MATERIALS: ARTICLES

Addadzi-Koom, Maame Efua & Lydia A Nkansah, "Women at the Bench: Does it Make a Difference? Assessing the Impact of Women Judges in Addressing Gender-Based Issues in Ghana" (2019) 28 Onati Socio-Legal Series 1-22.

Acheampong, Elizabeth, "Matrimonial Property Division at Marriage Breakdown: The Way Forward" (2007) 4 KNUST LJ 78.

Adams, Bert N & Edward Mburugu, "Kikuyu Bridewealth and Polygyny Today" (1994) 25:2 Journal of Comparative Family Studies 159-166.

Amponsah, Nii David A, "The Rule in Angu v Attah Revisited" (1987-1988) 16 Rev Ghana L 281.

Anderson, Siwan, "The Economics of Dowry and Bridewealth "(2007) 21:4 Journal of Economic Perspectives 151-174.

Ahenkorah, Twenewaa Olympia, Matrimonial Property Rights of Women upon Divorce in Ghana, Under the Prism of Legal Empowerment: To Which Extent does the Lack of Substantive Legislation on Property Settlement upon Divorce Constitute a Breach of the CEDAW? (Master's Thesis, University of Oslo,2013).

Ani, Casimir, Matthew Chukwuelobe C & Collins Ugwu, "The Church and Gender Equality in Africa: Questioning Culture and the Theological Paradigm on Women Oppression" (2014) 4:2 Open Journal of Philosophy 8.

Anievas, Alexander & Karem Anievas, "Limits of the Universal: The Promises and Pitfalls of Postcolonial Theory and its Critique" (2017) 25:3 Historical Materialism36-75.

Anamzoya, Alhassan, "Chieftaincy Conflicts in Northern Ghana: The Case of the Bimbilla Skin Succession Dispute" (2010) 3 Journal of Intra-African Studies 50.

Akujobi, Onuoha Reginald, "Discriminatory Property Inheritance under Customary Law in Nigeria: NGOs to the Rescue (2008) 10:2 International J not-for-Profit L 79.

Akoto, Augustina, “Why Don’t They Change? Law Reform, Tradition and Widows’ Rights in Ghana” (2013) 21:3 Fem Leg Stud 263-279.

Allott, Anthony N, “Towards the Unification of Laws in Africa” (1965) 14:2 Int’l & Comp L Q 377.

Allott, Anthony N, & J.S Read, “Colloquium on African Law, London” (1961) 5:3 J Afr. L 125-138.

Allott, Anthony N, “What is to be Done with African Customary Law-The Experience of Problems and Reforms in Anglophone Africa from 1950” (1984) 28:1/2 J Afr. L 65.

Allott, Anthony N, “The Judicial Ascertainment of Customary Law in British Africa” (1997) 3:20 Mod L Rev 244-263.

Allot, Anthony N, “Court Act 1971” (1972) 16: 1 J Afri L 61.

Allott, Anthony, “The People as Law Makers, Customs, Practices and Public Opinion as Source of Law in Africa and England” (1977) 21:1 J Afr Law 23.

Ajayi, Festus A, “The Interaction of English Law and Customary Law in Western Nigeria” (1960*)* 4:2 J Afr Law 98.

Asante, Samuel KB, “Over A Hundred Years of a National Law of Succession in Ghana: A Review and Critique” (1987) 31:1/2 J Afr L70.

Asiedu-Akrofi, Derek, “Judicial Recognition and Adoption of Customary Law in Nigeria” (1989) 37 :3 The Am J Comp L 571-593.

Awusabo- Asare, Kofi, “Matriliny and the New Intestate Succession Law of Ghana” (1990) 24:1Can J Afri Stud 1-16.

Bankas, K Ernest, “Problems of Intestate Succession and the Conflict of Laws in Ghana” (1992) 26:2 Intl Lawyer 433.

Bala, Nicholas & Rebecca Jaremko Bromwich, “Context and Inclusivity in Canada’s Evolving Definition of the Family” (2002) 16:2 International Journal of Law, Policy & the Family 145-180.

Bavel, Van Hannelore, “At the Intersection of Place, Gender and Ethnicity: Changes in Female Circumcision among Kenyan Maasai” (2020) 27:8 Gender, Place & Culture 1071-1092.

Beningola, Anna Martin, “Intersectionality: A Tool for The Gender Analysis of Sexual Violence at ICC” (2017) 9:2 Amsterdam Law Forum 85.

Bentsi-Enchill, Kwamena, “Choice of law in Ghana Since 1960” (1971) 8:2 U Ghana LJ 59.

Bohannan, Paul, “The Differing Realms of the law” in Laura Nader, eds, *The Ethnography of Law* (1965) 67:6 Amer Anthrop 33-42.

Bond, E Johanna, “CEDAW in sub-Saharan Africa: Lessons in Implementation” (2014) Mich St L Rev 241.

Carastathis, Anna, “The Concept of Intersectionality in Feminist Theory” (2014) 9:5 Philosophy Compass 304-314.

Clark, Gracia, “Mothering, Work and Gender in Urban Asante Ideology and Practice” (1999) 101:4 Amer Anthrop 717-29.

Cotran, Eugene, “Marriage, Divorce and Succession Laws in Kenya: Is Integration or Unification Possible” (1996) 40:2 J Afr L 194-204.

Cowan Ruth B, “Women’s Representation on the Courts in the Republic of South Africa” (2006) 6 :2 University of Maryland LJ Race, Religion, Gender &Class 291-318.

Crenshaw, Kimberlie, “Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Colour” (1991) 43:6 Stan L Rev 1241.

Dankwa, V O Emmanuel, “Progress and Regress in Samansiw” (1978-1981) 97:15 U Ghana L J 97-112.

Davies, Sue, “Do Women Judges Speak in A Different Voice?’’: Carol Gilligan, Feminist Legal Theory, and the Nineth Circuit (1992-1993) 8:143 Wis Women’s LJ 143-73.

Davies, Julia A & Dominic N Dagbanja, "The Role and Future of Customary Tort Law in Ghana: A Cross-Cultural Perspective" (2009) 26:2 Ariz J Int'l & Comp L 305-306.

Diala, Anthony C, "The Shadow of Legal Pluralism in Matrimonial Property Division Outside the Courts in Southern Nigeria" (2018) 18:2 AHRLJ 706.

Diala, Anthony C, "A Critique of the Judicial Attitude towards Matrimonial Property Rights under Customary Law in Nigeria's Southern States" (2018) 18: 2 AHRLJ 100-122

Diala, Anthony C, "The Concept of Living Customary Law: A Critique" (2017) 49:2 J Leg Pluralism &Unofficial L 143.

Dzidzornu, David M, "Human Rights and the Widow's Material Security: The Case of the "Intestate" Ghanaian Widow" (1995) 28:4 Law and Politics in Africa, Asia, and Latin America 489.

Ewelukwa, Uche U, "Post-Colonialism, Gender, Customary Injustice: Widows in African Societies" (2002) 24 Hum Rts Q 424.

Falk-Moore, Sally, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" (1973) 7:4 Law & Soc'y Rev 719-746.

Fenrich, Jean Marie & Higgins Tracy, "Promise Unfulfilled: Law, Culture and Women's Inheritance Rights in Ghana" (2001) 25:2 Fordham Intl LJ 259.

Fehlberg, Belinda, "Spousal Maintenance in Australia" (2004) 18:1 Int'l JL Pol'y & Fam 1-37.
Gardner, James A, "The Sociological Jurisprudence of Roscoe Pound" (1962) 7:1Vill L Rev 1.

Fuller, Lon L, "Human Interaction and the Law" (1969) 14:16 Am J Jurispr 1.

Gedzi, Victor, "PNDC Law 111 in Ghana and International Human Rights Law" (2014) 2:2 Global Journal of Politics & Law Research 15.

Gedzi, Victor, "Property Relations and Women's Access to Courts among the Anlo and the Asante in Ghana" (2012) 29 :8 European Scientific Journal at 75.

Geng Yaag & Zhang Qiue, The Essence, Characteristics and Limitation of Post-Colonialism: from Karl Marx's Point of View (2006) 2 Front Philos. China 279-294.

Ghai, Yash, "African Conference on Local Courts and Customary Law: Record of the Proceedings of the Conference held in Dar es Salaam" (1964) 4:2 J Mod Afr. Stud 613-615.

Goodsell, Erin, "Constitution, Customs and Creed: Balancing Human Rights Concerns with Cultural and Religious Freedoms in Today's South Africa" (2007) 21 :1Brigham Young Univ J Public Law 112.

Grant, Lamond, "Precedent" (2007-09) 5:2 Philosophy Compass 699-711.

Hale, Lady, "Making a Difference? Why We Need a More Diverse Judiciary'' (2005) 56 N Ir Leg Q 281-292.

Hammond, Ama, "Reforming the Law of Intestate Succession in a Legally Plural Ghana" (2019) 51:1 J Leg Pluralism & Unofficial L 117.

Hansen, Trier T, "Implementation of International Human Rights Standards through National Courts in Malawi" (2002) 46 Journal of African Law 31-42.

Halperin, Jean-Louis, "Law in Books and Law in Action: The Problem of Legal Change" (2011) 64:1/4 Maine L Rev 45.

Hellum, Anne, "Women's Human Rights and African Customary Laws: Between Universalism and Relativism" (1998)10:2 Eur J Dev Res 88.

Hoyles, NW, "Civil Code of the Province of Quebec" (1904) Can L. Times 113.

Hunter, Rosemary, "Can Feminist judges make a difference?" (2008) 15:1/2 I.J.L.P 7-36.

Hutchinson Terry & Duncan Nigel, "Defining and Describing What We Do: Doctrinal Legal Research" (2012) 17:1 Deakin L Rev 83-119

Hibou, Beatrice, "Doing Postcolonial Studies Differently: Interview with Mohammed Tozy" (2013) 7:4 International Political Sociology 444.

Himonga, Chuma & Fatima Diallo, "Decolonisation and Teaching Law in Africa with Special Reference to Living Customary Law" (2017) 20:1 Potchefstroom Electronic Law Journal 11.

Himonga Chuma & Craig Bosch, "The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning" (2000) 117 S Afri LJ 306

Ismail, Mahomed, “The Future of Roman-Dutch Law in Southern Africa, particularly in Lesotho” (1985) 357 :1 Les L J 357-61.

Jewkes, Rachel, “Intimate Partner Violence: Causes and Prevention” (2002) 9315:359 Lancet 1423-1429.

.

Juma, Lawrence, “Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalisation of Customary Adjudication Processes” (2002) 14:3 St Thomas L Rev 459.

Kamau, Winifred, “Judicial Approaches to the Applicability of Customary Law to Succession Disputes in Kenya” (2015) E AFR LJ 157.

Kameri-Mbote, Patricia, “Gender Dimensions of Law, Colonialism and Inheritance in East Africa: Kenya Women’s Experiences” (2002) 35:3 Law & Politics in Africa, Asia, & Latin America 373.

Kaspiew, Rae & Qu Lixia, “Property Division after Separation: Recent Research Evidence” (2016) 30:1 Austl J Fam L 1-27.

Kludze, Anesulmus KP, “The Formalities of the Customary Law Will” (1975) 12: 1 U Ghana L J 45.

Kludze, Anesulmus KP, “Problems of Intestate Succession in Ghana’’ (1972) 9:2 U Ghana LJ 89.

Korang, Daniel, “Ascertainment of Customary Law: A Question of Law or of Facts or Both” (2015) 38 Journal of Law, Policy & Globalization 3.

Kiye, Emmanuel M, “Conflict between Customary Law and Human Rights in Cameroon: The Role of the Courts in Fostering an Equitably Gendered Society” (2015) 36:2 African Study Monographs 75-100.

King, Rosemond, “Is it Time for a Progress Report on Violence against Women in Ghana?” (2006) 17:7 Human Rights Rev 78.

Kuenyehia, Akua, “The State of Women’s Human Rights in Ghana: The Law and its Enforcement” (2000) 6:2 Institute of Economic Affairs 5.

Leckey, Robert, "Judging in Marriage's Shadow" (2018) 26:25 Fem Leg Stud 45.

Malleson, Kate, "Rethinking the Merit Principle in Judicial Selection" (2006)33:1 JL & Soc'y 126-140.

Mbatha, Likhapha, "'Reforming the Customary Law of Succession" (2002) 18 South Afri J Hum Rts 259-286.

Meekers, Dominique, "Freedom of Partner Choice in Togo" (1995) 26:2 Journal of Comparative Family Studies 163-78.

Menkel-Meadow, Carrie, "The Comparative Sociology of Women Lawyers: The Feminization of the Legal Profession" (1986) 24 :4 Osgoode Hall LJ 897.

Mensa-Bonsu, HJAN, "Of Nuts in the Ground not being Groundnuts: The Current State of Customary Law in Ghana" (2002) 22 :1 U of Ghana LJ 1.

Mohanty, Chandra T, "Under Western Eyes: Feminist Scholarship and Colonial Discourses" (1984) 12/3:2 Boundary 333-358.

Morris, Jennifer N, *The Domestic Violence Act: Ghana's Bright Future* (Masters' Thesis, University of Texas, 2012).

Mishra, Archana, "Vicissitudes of Women's Inheritance Right-England, Canada, and India at the Dawn of 21st Century" (2016) 58:4 Journal of the Indian Law Institute 481-508.

Mikano, Kiye E, "The Repugnancy and Incompatibility Tests and Customary Law in Anglophone Cameroon" (2015) 15:2 African Studies Quarterly 93.

Ndulo, Muna, "African Customary Law, Customs and Women's Rights" (2011) 18:1 Ind J Global Leg Stud 87 at 102.

Nwauche, Enyinna S, “The Constitutional Challenge of the Integration and Interaction of Customary and Received English Common Law in Nigeria and Ghana” (2010) 25 Tul Eur & Civ LF 37.

Obeng-Hinneh, Rosemary & Albert Kpoor, “Cohabitation, and its Consequences in Ghana” (2021)

Journal of Family issues 1-23.

Oni, Adetunji Babatunde, “Discriminatory Property Inheritance Rights Under the Yoruba and Igbo Customary Law in Nigeria: The Need for Reforms” (2014) 19:2 Journal of Humanities & Social Sciences 30-34.

Ollenu, Nii A, “The Changing Law and Law Reform in Ghana” (1971) 15:2 J Afri L 132-181.

Oluwole Ayodele Johnson, “Gender Victimization: A Study of Widowhood Practices Among Ogu People of Lagos” (2014) 4:3 Sage Open 6.

Owino, Lisa, “Application of African Customary Law: Tracing its Degradation and Analyzing the Challenges it Confronts” (2016) 1: 1 Strathmore L Rev 143.

Oware Dankwa, Emmanuel, “Implementation of International Human Rights Instruments: Ghana as an Illustration” (1991) 3 Annual Conference -African Society of International & Comparative Law 57-64.

Okyere- Manu, Beatrice, “Cohabitation in Akan Culture of Ghana: An Ethical Challenge to Gatekeepers of Indigenous Knowledge Systems in the Akan Culture” (2015) 14 Alternation Special Edition 45-60.

Oteng Kufuor, Kofi, ‘’The Ghanaian Council of State as a Constitutional Second Chamber’’ (1994) 43:3 ICLQ 934-945.

Patton, Sharon F, “The Stool and Asante Chieftaincy” (1979) 13:1 African Arts 74.

Peterman, Amber, “Widowhood and Asset Inheritance in Sub-Saharan Africa: Empirical Evidence from 15 Countries” (2012) 30:5 Dev Policy Rev 543.

Penk, Archer, “Codification of the Law: Ghana’s Experience” (1987) 13:3 Comm Law Bull 1044-1050.

Philips, Marjorie, "Problems of Questionnaire Investigation" (2013) 12:3 Research Quarterly, American Association for Health, Physical Education & Recreation 528-537.

Rautenbach, Christa, "South African Common and Customary Law of Intestate Succession: A Question of Harmonization, Integration or Abolition" (2008) 12:1 EJCL 1.

Rufai, Kilu Haruna, "Engendering Peace Building in Ghana: The Role of Queen Mothers in Traditional Conflict Resolution in Ga Traditional Areas" (2015) 4:1 International Journal of Innovative Research & Studies 127.

Richardson, Abby M, "Women's Inheritance Rights in Africa: The Need to Integrate Cultural Understanding and Legal Reform" (2004) 11:2 Human Rights Brief 4.

Roberts, Simon, "Malawi Law of Succession: Another Attempt at Reform" (1968) 12 J AFR L 81.

Roberts, Simon, "The Tswana Polity and "Tswana Law and Custom" Reconsidered" (1985) 12:1 Journal of Southern African Studies 75-87.

Roberts, Simon, "The Recording of Customary Law: Some Problems of Methods" (1971) 3 Botswana Notes & Records 12-21.

Roy, Alpana, "Post-Colonial Theory and Law: A Critical Introduction" (2008) 29: ½ Adel L Rev 315-358.

Roscoe, Pound, "Law in the Books and Law in Action" (1910) 44 Am L Rev 12.

Rubin, Neville N, "Swazi Law of Succession: A Restatement" (1965) 9:2 J Afr. L 90-113.

Rush, Sharon E, "Feminist judging: An Introductory Essay" (1993) 2:2 S Cal Rev L &Women's Stud 609-32.

Sarat, Austin & Susan Silbey, "The Pull of the Policy Audience" (1988)10:2/3 Law & Pol'y 97-166.

Sarbah, John M, Joseph B Danquah & Nii A Ollenu, "African Legal Traditions" (1987) 31:1 J Afri L 44 at 47.

Silbey, Susan S, "After Legal Consciousness" (2005)1Annu Rev Law & Soc Sci *323*.

Smith, Daniel J, "Promiscuous Girls, Good Wives and Cheating Husbands: Gender Equality, Transitions to Marriage and Infidelity in Southeastern Nigeria" (2010) 83:1 Anthropological Quarterly 1.

Shadle, Bret L, "Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya" 1930-60" (1999) 40:3 J Afri Hist 411.

School of Oriental & African Studies, "Conferences on African Law" (1963) 7:3 J Afr. L 133-135.

Stoeltje, Beverly J, "The Performance of Litigation: Asante Custom and the Juaben Court" (2006) 21:1 Institute of African Studies Research Review 47-61.

Stoeltje, Beverly J, "Asante Queen Mothers: A Study in Female Authority" (1997) 810:1 Annals of the New York Academy of Sciences 41-71.

Solimine, Michael E, & Susan E Wheatley, "Rethinking Feminist Judging" (1995) 70 :3 Ind L Rev 891-920.

Tanner, Ralph ES, "The Codification of Customary Law in Tanzania" (1966) 2 E Afr LJ 105.

Taiwo, Elijah A, "Repugnancy Clause and its Impact on Customary Law: Comparing the South African and Nigeria Positions-Some Lessons for Nigeria" (2009) 34:1 J Juridical Sci 89.

Tenkorang, Y Eric et al, "Factors influencing Domestic Violence and Marital Violence against

Women in Ghana" (2013) 28: 8 Journal of Family Violence 12.

Tebbe, Nelson, "Inheritance and Disinheritance: African Customary Law and Constitutional Rights" (2008) 88:4 Journal of Religion 466-496.

Toomey, Leigh T, "A Delicate Balance: Building Complementary Customary and State Legal Systems" (2010) 3:1 Law & Development Review 157.

Twining, William, "The Restatement of African Customary Law: A Comment" (1963) 1:2 J. Mod. Afr. Stud. 221-228.

Wendpanga, Eric S, "Imported Religions, Colonialism and the Situation of Women in Africa" (2015) 3 Schriftenreihe Junges Afrikazentrum 10.

Woodman, Gordon R, "Some Realism about Customary Law-The West African Experience" (1969) 1969:1 WIS L Rev 128.

Wilson, Bertha, "Will Women Judges Really Make a Difference?" (1990) 28:3 Osgoode Hall LJ 507-22.

Willmott, Lindy, Benjamin Matthews & Greg Shoebridge, "Defacto Relationships Property Adjustment Law-A National Direction" (2003) 17:1 Austl J Fam L 37-61.

Whelpton, FPvR, "The Indigenous Swazi Law of Succession: A Restatement" (2005) 2005: 4 Journal of South African Law 828-841.

Zwart, Tom, "Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach" (2012) 34: 2 Hum Rts Q 546.

SECONDARY MATERIALS: MONOGRAPHS

Anyidoho, Akosua & ME Kropp Dakubu, "Ghana: Indigenous Languages, English and an Emerging National Identity" in Andrew Simpson, eds, *Language and National Identity in Africa* (New York: Oxford University Press Inc,2008).

Acquah, George K, "The Judicial Role of the Chief in Democratic Governance" in Irene K Odotei & Albert K Awedoba, eds, *Chieftaincy in Ghana: Culture, Governance and Development* (Accra: Sub-SaharanPublishers,2006).

Ardayifio-Schandorf, Elizabeth, *The Changing Family in Ghana* (Accra: Ghana Universities Press,1952).

Akamba, Joseph B & Isidore K Tufuor, "The Future of Customary Law in Ghana" in Jean Marie Fenrich & Paolo Galizzi, eds, *The Future of African Customary Law* (London: Cambridge University Press, 2011).

An-Na'im, Abdullahi Ahmed, "A Quest for Consensus'' in Abdullahi Ahmed An -Na'im et al, eds, *Human Rights in Cross-Cultural Perspectives* (Pennsylvania: University of Pennsylvania Press,1992).

Amoako-Baah, Richard, *Human Rights in Africa: The Conflict of Implementation* (PHD Dissertations: University of Tennessee,1999).

Allott, Anthony, *New Essays in African Law* (London: Butterworth-Heinemann,1970).

Banakar, Reza, *Sociology of Law* (London: University of Westminster,2011).

Bantekas, Ilias & Lutz Oette, *International Human Rights Law and Practice*,2nd ed (Cambridge: Cambridge University Press,2016).

Bekker, JC, NJJ Olivier & WH Olivier, *Indigenous Law* (Butterworths, Durban,1995).

Bradford, Morse W & Gordon R Woodman*, Indigenous Law, and the State* (Dordrecht, Holland: Foris publishers,1988).

Bond, Johanna E, "Intersectionality, Women's Rights in Africa and The Maputo Protocol" in Veronica Fynn Bruey, *Patriarchy and Gender in Africa, eds,* (Lanham, USA: Lexington Books,2021).

Caldwell, John C, *Population Growth and Family Change in Africa: The New Urban Elite in Ghana* (Canberra: Australian National University Press,1968).

Cousins, Ben, "Contextualising the Controversies: Dilemmas of Communal Tenure Reform in Post-Apartheid South Africa"' in Annika Claassens, A& and Ben Cousins, B, eds, *Land, Power & Custom: Controversies generated by South Africa's Communal Land Rights Act* (Cape Town: Juta and Company Ltd,2008).

Cotran, Eugene, *Kenya: The Law of Marriage and Divorce, Succession* (London: Sweet and Maxwell,1968).

Cochrane, Glynn, *Development Anthropology* (New York: Oxford University Press,1971).

Cotran, Eugene, *Restatement of African Law: The Law of Succession*, vol 2, Kenya II (London: Sweet & Maxwell, 1969).

Chanock, Martin, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge University Press, 1998).

Chigavazira, Abraham et al, *The Consequences of Extending Equitable Property Division Divorce Laws to Cohabitan*ts (Germany, Institute of Labour Economics,2019).

Dawuona- Hammond, Christine, "Women, and Inheritance in Ghana" in Akua Kuenyehia, eds, *Women and Law in West Africa: Situational Analysis of Some Key Issues Affecting Women* (Accra: WALWA,1998).

Deng, Dau M Santino, *The Dichotomy between Cultural Relativism and Universalism: A Case for Universalism in the Application of International Human Rights Standards in Post-Colonial Africa* (Master of Laws Dissertation: Dalhousie University, 2014).

Daniels, WC Ekow, *Problems in the Law Relating to the Maintenance and Support of Wives and Children* (University of Ghana: Institute of African Studies, 1974).

Danquah, Joseph B, *The Akan Doctrine of God* (Lutterworth: London,1944).

Davies, Margaret, *Asking the Law Questions (*Sydney: Sweet & Maxwell,1994).

Dawuni, Josephine & Gretchen Bauer, *Gender, and the Judiciary in Africa: From Obscurity to Parity?* (New York: Routledge Press,2015).

Deflem, Mathieu, *Sociology of Law: Visions of a Scholarly Tradition* (Cambridge UK: Cambridge University Press,2008).

De Graft Johnson, KE, "Succession and Inheritance among the Fanti and Ewe" in Christine Oppong, eds, *A Comparative Study of Current Trends in Domestic Rights and Duties in Southern Ghana* (Ghana: University of Ghana,1974).

Eberegbulam, Njoku J, *The World of African Woman* (Lanham, MD: Scarecrow Press,1981).

Fabunmi, Jonathan O, *Equity, and trust in Nigeria* (Ile-Ife: University of Ife Press Limited, 1986).

Fitzpatrick, Peter & Eve Darian Smith, "Laws of the Postcolonial: An Insistent Introduction" in Fitzpatrick & Darian Smith, eds, *Laws of the Postcolonial* (Michigan: University of Michigan Press, 1999).

Gedzi, Victor, *Principles and Practices of dispute resolution in Ghana: Ewe and Akan procedures on Females' Inheritance and Property Rights* (PhD Dissertation, Erasmus University,2009).

Gilligan, Carol, In *a Different Voice* (Cambridge, MA: Harvard University Press,1982).

Gyan -Nyarko, Michael, The Impact of the African Charter, and Maputo Protocol in Ghana (University Pretoria,2016).

Goldberg, Suzanne, *Intersectionality in Theory and Practice: Intersectionality and Beyond (*Oxfordshire, UK*:* Routledge-Cavendish Publishing, 2008).

Hammond, Ama, *Towards an Inclusive Vision of Law Reform and Legal Pluralism in Ghana* (PhD Dissertation, University of British Colombia,2016).

Hart, Herbert L, *The concept of Law*, 2nd ed (Oxford: Clarendon press, 2012).

Harvey, William B, *A Value Analysis of Ghanaian Legal Development Since Independence* (Indiana: Bloomington, Indiana University,1964).

Howard Rhoda, *Group Versus Individual Identity in the African Debate: Human Rights in Africa a Cross-Cultural Perspective (*Washington, DC: Brookings Institution,1990).

Himonga, Chuma, "The Future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Refence to South Africa" in Jean Marie Fenrich et al, eds, in *The Future of African Customary Law* (London: Cambridge University Press,2016).

Ibik, J O, *The Law of Land, Succession, Movable Property, Agreement and Civil Wrongs*, Vol 4, Restatement of African Law Project (London: Sweet & Maxwell,1971).

Institute of African Studies &University of Ife, *Integration of Customary and Modern Legal Systems in Africa* (New York: Africana Publishing Corporation, 1971).

Isser, Deborah, "The Problem with Problematizing Legal Pluralism: Lessons from the Field" in Brian Tamanaha et al, eds, *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (London: Cambridge University Press, 2012).

Kane, Minneh, Joseph Oloka-Onyango & Abdul Tejan-Cole, "Reassessing Customary Law Systems as a Vehicle for Providing Equitable Access to Justice for the Poor" (New Frontiers of Social Policy Conference delivered at Arusha, December 2005).

Kalman, Laura, *Legal Realism at Yale 1927-1960*, 2nd ed (New Jersey: Law book Exchange Ltd, 2010).

Kenney, Sally, Which Judicial Selection Systems Generate the Most Women Judges? Lessons from the United States (2009).

Korang- Okrah, Rose, *Risk and Resilience: Ghanaian (Akan) Widows and Property Rights* (PhD Dissertation, University of Illinois,2012).

Kirwen, Michael C, *African Widows: An Empirical Study of the Problems of Adapting Western Christian Teachings on Marriage to the Leviratic Custom for the Care of Widows in Four Rural African Societies* (Maryknoll, New York: Orbis books,1979).

Kludze, Anselmus KP, *Ewe Law of Property*, Vol 6 (London: Sweet and Maxwell,1973).

Kameri- Mbote, Patricia, The Law of Succession in Kenya: Gender Perspectives in Property Management and Control (Nairobi: Kenya, International Environmental Law Research Centre,1995).

Kludze, Anselmus KP, *The Family Property and Succession among the Northern Ewe-Speaking People of Ghana* (PhD Dissertation, University of London, 1969).

Kuenyehia, Akua & Esther Ofei- Aboagye, "Family Law in Ghana and its implications for Women" in Akua Kuenyehia, eds, *Women and Law in West Africa: Situational Analysis of Some Key Issues Affecting Women* (Legon: Women &Law in West Africa,1998).

Kutsoati, Edward & Randall Morck, *Family Ties, Inheritance Rights and Successful Poverty Alleviation: Evidence from Ghana (2014) African Successes: Human Capital* (Chicago: University of Chicago Press,2014).

Krishnamurthy, Mekhala, *In the Shadow of the State in the Shade of a Tree: The Politics of the Possible in Rural Gujarat* (bachelor's Thesis: Harvard University,2002).

King, Chan Lo, *Unravelling the Dynamics of Spousal Abuse through the Narrative Account of Chinese Male Batterers* (PhD Dissertation, University of Hong Kong,2000).

Mansela, Chavez et al, *No Permanent Waves: Recasting Histories of US Feminism (*New Jersey: Rutgers University Press, 2010).

Mather, Lynn, *Law, and Society* (Oxford: Oxford University Press,2018).

Manuh, Takyiwaah, "Wives, Children and the Intestate Succession in Ghana" in Gwendolyn Mikell, eds, *African Feminism: The Politics of Survival in Sub-Saharan Africa* (Philadelphia: University of Pennsylvania,1997).

Makonnen, Timo, Multiple, *Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalised to the Fore* (LLM Dissertation, Abo Akademi University, 2002).

Makau, Mutua, "Savages, Victims and Saviours, The Metaphor of Human Rights" (2001) 42:1 Harvard Int LJ 201-245.

Mensah- Sarbah, John, Fanti *Customary Laws: A Brief Introduction to Principles of the Native Laws and Customs of the Fanti and Akan Districts of the Gold Coast, with a Report of Some Cases Thereon Decided in the Law Courts* (Bristol: Cass,1968).

Middleton, John & Joseph C Miller, 'Gender' in New Encyclopedia of Africa, vol 5 (Detroit: Charles Scribner's Sons,2008).

Mills, Sara, Discourses *of Differences: An Analysis of Women's Travel Writings and Colonialism* (London, UK: Routledge Press,1991).

Mgbako, Chi & Kristiana Scurry Baehr, "Engaging Legal Dualism" in Jean Marie et al eds, *The Future of African Customary Law*, eds, (Cambridge UK: Cambridge University press,2011).

Moodley, Isabel, *The Customary Law of Intestate Succession* (PhD Dissertation, University of South Africa,2012).

Oluwole, Agbede I, "Legal Pluralism: The Symbiosis of Imported Customary and Religious Laws: Problems and Prospects" in Ayo M Ajomo, eds, *The Fundamentals of Nigeria Law* (Lagos: Nigeria Institute of Advanced Legal Studies, 1989).

Ollenu, Nii A, *The Law of Testate and Intestate Succession in Ghana* (London, UK: Sweet and Maxwell, 1966).

Oluwasina Ayeni, Victor, *The Impact of the Africa Charter, and the Maputo Protocol in Selected African States* (South Africa, Pretoria University Law Press, 2016)

Olawale Elias, "The Problem of Reducing Customary Laws to Writing" in Alison Dundes Renteln & Alan Dundes, eds, *Falk Law Essays in Theory and Practice of Lex Non Scripta,* 1st ed (London: Routledge Press,1994)

Oppong, Christine, *Growing up in Dagbon* (Accra: Ghana Publishing Corporation,1973).

Phyllis, Martin M & Patrick O'Meara, *Africa*, 3rd ed (Bloomington: Indiana University Press,1995).

Poonacha, Veena & Divya Pandey, *Responses to Domestic Violence in the States of Karnataka and Gujarat Mumbai: Research Centre for Women's Studies* (SNDT Women's University).

Quansah Elizabeth K "An Examination of the Use of International Law as an Interpretive Tool in Human Rights Litigation in Ghana and Botswana" in Magnus Killander, ed, *International Law and Domestic Human Rights in Africa* (South Africa, Pretoria University Law Press,2010).

Quayson, Ato, "Post Colonialism and & Postmodernism" in Henry Schwarz &Sangeeta Ray, eds, *A Companion to Postcolonial Studies* (Oxford, UK: Blackwell Publishing Ltd,2000).

Rautenbach, Christa & Willemien du Pleiss, "Reform of the South African Customary Law of Succession" in Jean Marie et al eds, *The Future of African Customary law (*Cambridge University Press,2011).

Rackley, Erika, *Women, Judging and the Judiciary: From Difference to Diversity* (Oxfordshire: Routledge-Cavendish Press,2013).

Roberts, Simon, *Restatement of African Law, Botswana, Twsana Family Law*, vol 5(London: Sweet and Maxwell,1972).

Radcliffe -Brown, Alfred R & Daryll Forde, *African Systems of Kinship and Marriage* (London: Routledge Press,2015)).

Sqhelo, Koyana Digby, "Traditional Courts in South Africa in the 21st Century" *in the Future of African Customary Law,* Jean Marie Fenrich et al, eds, (Cambridge University Press,2011).

Schapera, Isaac & John L Comaroff, *The Tswana* (London: Routledge Taylor &Francis Group,2015).

Schapera, Isaac, A *Handbook of Tswana Law and Custom* (London: Routledge Press,2019).

Sheehy, Elizabeth, *Adding Feminism to Law: The Contributions of Justice Claire L' Heureux-Dube* (Canada, Toronto: Irwin Law,2004).

Stjernquist, Per, *Organised Co-operation Facing Law: An Anthropological Study* (Stockholm: Almquist and Wiksell International, 2000).

Tsalim, Elias O, *British Colonial Law: A Comparative Study of the Interaction between English Law and Local Laws in British Dependencies* (London: Stevens & Sons Limited,1962).

Ubink, Janine, "The Quest for Customary Law in African State Courts in the Future of African Customary Law" in Jean-Marie Fenrich et al, eds, *The Future of African Customary Law* (Cambridge University Press,2011).

Vellinga, Dee Dorothy, "The Widow among the Matrilineal Akan of Southern Ghana" in Betty Potash, eds, Widows *in African Societies: Choices and Constraints* (Cambridge: Cambridge University Press,1986).

Verhelst, Thierry, *Safeguarding African Customary Law: Judicial and Legislative Processes for its Adaptation and Integration* (California: UCLA international Institute,1970).

Wambui, Wa Karanja, "'Outside Wives' and 'Inside Wives' in Nigeria: A study of Changing Perceptions" in D. Parkins & D Nyamwaya, eds, *Transformations in African Marriages* (Manchester: International African Institutte,1987).

Wafula, Trixy Taria, *Analysis of Succession of Property in Kenya in the Case of Cohabitees* (Bachelor of Laws Dissertation, Strathmore University, 2018).

Woodman, Gordon R, *Survey of Customary Laws in Africa in Search of Lessons for the Future in the Future of African Customary Law* (London: Cambridge University Press,2011).

Woodman, Gordon R, "Customary Law, State Courts and the Notion of Institutionalization of Norms in Ghana and Nigeria" in Anthony Allott & Gordon R Woodman, eds, *People's Law and State Law* (The Bellagio papers. Berlin, New York: De Gruyter Mouton,2011).

Young, Robert JC, *Postcolonialism: A Historical Introduction* (New Jersey: Wiley - Blackwell,2001).

OTHER MATERIALS

REPORTS

Commission on Human Rights and Administrative Justice, "Trokosi as a Form of Customary Ritual Servitude" 7 CHRAJ Report.

DFID, UK, Background Paper on Gender Issues in Ghana', Bridge Development-Gender (Report no. 19 Brighton: Institute of Development Studies,1994).

Ghana Statistical Service &Institute for Resource Development/Macro Systems Inc, Ghana Demographic and Health Survey (1989).

Ghana Official Report of Debates of Parliament (4th session of the 5th Parliament of 4th Republic Fourth Series Vol.76, No.2.

Ghana Statistical Service, Population and Housing Census (2013).

Office of International Religious Freedom,2020 Report on International Religious Freedom: Ghana (U S Department of State, 2021).

Monitoring & Evaluation Department, Male/Female Judge Ratio in Ghana (Accra: Judicial Service of Ghana, 2014).

International Center for Research on Women, Domestic *Violence in India* vol 1-5(Washington DC: USAID/India, 2002).

ONLINE RESOURCES

Erika W Smith, "How One Kenyan Woman is Fighting Female Genital Mutilation" (11 February 2020), online:<http://www.refinery29.com>.

The Commonwealth, "Ghana: Constitution and Politics", online: <http//thecommonwealth.org/our member-countries/ ghana /constitution-politics.>.

The Commonwealth, "Ghana: Constitution and Politics" online:http://thecommonwealth.org/our-member-countries/ghana/constitution-politics.

OXFAM International, Ghana: Extreme Inequality in Numbers (2021), online: http://www.oxfam.org/fr/node/7547.

Unifem, Integrating Gender into The Third World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (2001), online:<www.unifem.undp.org/hr_racism.html>.

The Judicial Service of Ghana (2020), online: <http//www.judicial.gov.gh>.

Judicial Studies Institute of Uganda<http://www.judicature.go.ug/Uganda/index.html>.

The West African Judicial Colloquia, Dakar, Senegal, January 2006, Accra, Ghana,2007, <http://www.brandeis.edu/ethics/pdfs/internationaljustice/WAfrica Colloq.pdf >.

Spektra Global, "Do You Know About Willls" < http://spektra.global// do-you-know-about-wills>.